DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 08-1553
Vide 08-1554
Title: Kawasaki Kisen Kaisha Ltd., et al., Petitioners
v.
Regal-Beloit Corporation, et al.
Docketed: June 19, 2009
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (06-56831)
Decision Date: February 17, 2009
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
Apr 17 2009	Application (08A911) to extend the time to file a petition for a writ of certiorari from May 18, 2009 to July 2, 2009, submitted to Justice Kennedy.
Apr 20 2009	Application (08A911) granted by Justice Kennedy extending the time to file until June 18, 2009.
Jun 18 2009	Petition for a writ of certiorari filed. (Response due July 20, 2009)
Jun 24 2009	Consent to the filing of amicus curiae briefs, in support of either party or neither party, received from counsel for the petitioners.
Jul 6 2009	Order extending time to file response to petition to and including August 19, 2009.
Jul 20 2009	Brief amicus curiae of World Shipping Council filed. VIDED.
Jul 20 2009	Brief amici curiae of International Group of Protection and Indemnity (P&I) Clubs, et al. filed. VIDED.
Jul 27 2009	Order further extending time to file response to petition to and including September 18, 2009.
Sep 18 2009	Brief of respondents Regal-Beloit Corporation, et al. in opposition filed. VIDED.
Sep 29 2009	Reply of petitioners Kawasaki Kisen Kaisha Ltd., et al. filed.
Sep 30 2009	DISTRIBUTED for Conference of October 19, 2009.
Oct 20 2009	Petition GRANTED the case is consolidated with No. 08-1554 and a total of one hour is allotted for oral argument.
Nov 2 2009	The time within which to file the joint appendix and petitioners' briefs on the merits is extended to and including December 23, 2009. VIDED.
Nov 2 2009	The time within which to file respondents' brief on the merits is extended to and including February 10, 2010. VIDED.
Dec 22 2009	Consent to the filing of amicus curiae briefs in support of either party or neither party received from counsel for Kawasaki Kisen Kaisha, Ltd., et al. VIDED.
Dec 23 2009	Brief of petitioners Kawasaki Kisen Kaisha Ltd., et al. filed.

Dec 23 2009	Brief of petitioner Union Pacific Railroad Co. filed. VIDED.
Dec 23 2009	Joint appendix filed. VIDED. (Statement of costs filed)
Dec 23 2009	Brief amicus curiae of World Shipping Council filed. VIDED.
Dec 30 2009	Brief amicus curiae of United States filed. VIDED.
Dec 30 2009	Brief amici curiae of International Group of Protection and Indemnity (P&I) Clubs, et al. filed. VIDED.
Dec 30 2009	Brief amicus curiae of Association of American Railroads filed. VIDED.
Jan 4 2010	SET FOR ARGUMENT ON Wednesday, March 24, 2010.
Jan 22 2010	CIRCULATED.
Jan 26 2010	Application (09A714) for leave to file a consolidated respondents brief on the merits in excess of the word limitation, submitted to Justice Kennedy.
Jan 29 2010	Application (09A714) granted by Justice Kennedy for leave to file a consolidated respondents brief on the merits in excess of the word limitation provided that the brief does not exceed 25,000 words.
Feb 9 2010	The time within which to file respondents' brief on the merits is further extended to and including February 12, 2010. VIDED.
Feb 12 2010	Brief of respondents Regal-Beloit Corporation, et al. filed. VIDED. (Distributed)
Feb 15 2010	Consent to the filing of amicus curiae briefs, in support of either party or neither party, received from counsel for the respondents. VIDED.
Feb 16 2010	Record received from U.S.C.A. 9th Circuit. (1 envelope)
Feb 19 2010	Brief amici curiae of Transportation and Logistics Council, et al. filed. VIDED. (Distributed)
Feb 19 2010	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed. VIDED.
Mar 8 2010	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. VIDED.
Mar 11 2010	U.S.D.C. Record received from the Chambers of Judge Raymond C. Fisher of the U.S.C.A. for 9th Circuit. (1 box)
Mar 15 2010	Reply of petitioner Union Pacific Railroad Co. filed. VIDED. (Distributed)
Mar 24 2010	Argued. For petitioners: James Scott Ballenger, Washington, D. C.; and Anthony Yang, Assistant to the Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.) For respondents: David C. Frederick, Washington, D. C.

PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED

No. 08-081553 JUN 18 2009

IN THE OFFICE OF THE CLERK

Supreme Court of the United States

KAWASAKI KISEN KAISHA LTD. AND
K-LINE AMERICA, INC.,
Petitioners,

v.

REGAL-BELOIT CORPORATION *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Carmack Amendment to the Interstate Commerce Act of 1887, which governs certain rail and motor transportation by common carriers within the United States, 49 U.S.C. §§ 11706 (rail carriers) & 14706 (motor carriers), applies to the inland rail leg of an intermodal shipment from overseas where the shipment was made under a "through" bill of lading issued by an ocean carrier that extended the Carriage of Goods by Sea Act, 46 U.S.C. § 30701 Note, to the inland leg, there was no domestic bill of lading for rail transportation, and the ocean carrier privately subcontracted for rail transportation.

PARTIES AND RULE 29.6 STATEMENT

Petitioners Kawasaki Kisen Kaisha, Ltd. and K-Line America, Inc. were defendants in the district court and appellees in the court of appeals. Petitioner Union Pacific Railroad Company, which is petitioning from the judgment below by separate petition, also was a defendant in the district court and an appellee in the court of appeals. Respondents Regal-Beloit Corporation, Victory Fireworks, Inc., PICC Property & Casualty Co., Ltd. (Shanghai Branch), and Royal Sun Alliance Insurance Co., Ltd. were plaintiffs in the district court and appellants in the court of appeals.

Petitioner Kawasaki Kisen Kaisha, Ltd. has no parent corporation, and there is no publicly held company that owns 10% or more of its stock. Petitioner K-Line America, Inc. is not publicly traded, and its parent corporation is Kawasaki Kisen Kaisha, Ltd.

Union Pacific Railroad Company, formerly Southern Pacific Transportation Company, is majority owned by Union Pacific Corporation, which also wholly owns Southern Pacific Rail Corporation. Petitioners are unaware of any other person or entity that owns more than 10% of either Union Pacific Railroad Company, Southern Pacific Rail Corporation, or Union Pacific Corporation.

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IN THE

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No. 08-___

KAWASAKI KISEN KAISHA LTD. AND
K-LINE AMERICA, INC.,
Petitioners,

v.

REGAL-BELOIT CORPORATION *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioners Kawasaki Kisen Kaisha Ltd. and K-Line America respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The amended opinion of the United States Court of Appeals for the Ninth Circuit (Pet. App. 1a-35a) is reported at 557 F.3d 985. The opinion of the United States District Court for the Central District of California (Pet. App. 36a-47a) is reported at 462 F. Supp. 2d 1098.

JURISDICTION

The Ninth Circuit entered judgment on February 17, 2009. On April 20, 2009, Justice Kennedy extended the time for filing this petition for certiorari up to and including June 18, 2009. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Carmack Amendment to the Interstate Commerce Act, 49 U.S.C. §§ 11706, 14706, is reproduced in the Appendix (Pet. App. 69a-78a). Other relevant portions of the Interstate Commerce Act as well as the Carriage of Goods by Sea Act, 46 U.S.C. § 30701 Note, also are reproduced in the Appendix (Pet. App. 48a-61a).

STATEMENT OF THE CASE

Two Terms ago, in *Altadis USA, Inc. v. Sea Star Line, LLC*, 549 U.S. 1106 (2007), this Court granted certiorari to resolve an entrenched conflict among the circuits over a key question of statutory interpretation that affects billions of dollars in international shipping business each year. Most goods imported into the United States are now transported in large metal containers that can be carried by ocean vessels and then offloaded intact onto trains and trucks for inland shipping. Parties contracting for the transportation of goods in this manner commonly use a "through" bill of lading, which constitutes a single contract both for sea and land transportation.

There is no single federal statute that applies, by its own force, to all segments of such international, intermodal shipments. Transportation by rail and motor common carrier is governed by the Carmack Amendment to the Interstate Commerce

Act ("Carmack"), 49 U.S.C. §§ 11706 (rail carriers) & 14706 (motor carriers); transportation by ocean carrier is governed by the Carriage of Goods by Sea Act ("COGSA"), ch. 229, 49 Stat. 1207 (1936) (reprinted in the Note following 46 U.S.C. § 30701). These two statutory regimes impose liability on different grounds and differ in significant procedural respects.

The circuits are deeply split over whether Carmack applies to the inland leg of an international shipment that commences by ocean and continues by land under a single through bill of lading. This Court granted review in *Altadis* to resolve this split but was unable to do so because the case settled. *Altadis USA, Inc. v. Sea Star Line, LLC*, 549 U.S. 1189 (2007). This case presents anew the opportunity to resolve this question. Here, goods that were transported under intermodal through bills of lading issued overseas by an ocean carrier were damaged while being transported inland by a railroad company subcontracted by the ocean carrier. The bills of lading provided that COGSA governs all of the carriers' responsibilities through all segments of the transportation. Respondents claimed, however, that Carmack applies and bars application of a forum selection clause in the bills that is enforceable under COGSA. This Court should grant certiorari to resolve the question of which statute applies to the inland leg of such through bills of lading and controls the liability of ocean carriers issuing them—a question of fundamental importance to shippers, carriers, insurers, and others in the international shipping industry.

A. Statutory Background

In 1887, Congress enacted the Interstate Commerce Act to govern shipments by railroad, and it later amended the Act to cover motor carriers. Interstate Commerce Act, ch. 104, 24 Stat. 379 (1887) (codified at 49 U.S.C. § 10101 *et seq.*); *see also* Motor Carrier Act of 1935, ch. 498, 49 Stat. 543 (extending the Interstate Commerce Act to cover motor carriers). The Carmack Amendment to the Interstate Commerce Act, which governs liability for loss or injury to property in overland transit, was enacted in 1906, Pub. L. No. 59-377, § 7, 34 Stat. 593, 593-95 (1906) (currently codified at 49 U.S.C. § 11706), and extended to motor carriers in 1935, Motor Carrier Act of 1935, ch. 498, 49 Stat. 543, 563 (currently codified at 49 U.S.C. § 14706).

In 1936, Congress enacted COGSA to govern ocean-going transportation. COGSA, ch. 229, 49 Stat. 1207 (reprinted in the Note following 46 U.S.C. § 30701). COGSA governs "[e]very bill of lading . . . for the carriage of goods by sea to or from ports of the United States, in foreign trade." 46 U.S.C. § 30701 Note, Preamble.

COGSA and Carmack differ significantly. Under COGSA, a carrier's liability for injury and loss to goods in transit is based upon negligence. 46 U.S.C. § 30701 Note § 4. COGSA also permits carriers to enter into agreements that, for example, limit their liability absent a declaration of value by the shipper, *id.* § 30701 Note § 4(5), or contain forum selection clauses, *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 537-39 (1995). By contrast, Carmack imposes "something close to strict liability upon originating and delivering carriers." *Rankin v. Allstate Ins. Co.*, 336 F.3d 8, 9 (1st Cir. 2003).

Carmack generally prohibits carriers from limiting their liability contractually. 49 U.S.C. §§ 11706(c), 14706(c). Carmack also specifies the venues in which civil actions against carriers may be brought, *id.* §§ 11706(d), 14706(d), and thus has been interpreted to bar forum selection clauses, *see, e.g., Aaacon Auto Transp., Inc. v. State Farm Mut. Auto. Ins. Co.*, 537 F.2d 648, 654 (2d Cir. 1976).

The strictures of the Carmack Amendment were relaxed when Congress partially deregulated rail carriers in the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31, and the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895. As a result, rail carriers are now authorized to make private contracts with purchasers of rail services, and the transportation provided under such contracts is not subject to the Interstate Commerce Act, including Carmack. 49 U.S.C. § 10709; *see also* H.R. CONF. REP. NO. 96-1430, at 100 (1980) (providing that service pursuant to a contract under this provision "is exempt . . . from . . . all of the requirements of the Interstate Commerce Act"). In addition, the Surface Transportation Board, which now administers the Interstate Commerce Act, is authorized to exempt services and classes of transactions from most regulations under the Act. 49 U.S.C. § 10502(a). Rail carriers providing transportation that has been exempted under Section 10502 are not excused from Carmack's requirements, but they remain free to offer alternative terms and thereby contractually opt out of those requirements. *Id.* § 10502(e).

No statute by its own terms governs liability for property damage during all segments of intermodal transportation by sea and land. The Carmack Amend-

ment originally did not apply at all to goods traveling in international commerce. *See* Pub. L. No. 59-377, § 7, 34 Stat. 593, 595. In 1915, Congress extended Carmack beyond purely domestic transportation, but only to goods transported "from a point in the United States to a point in an adjacent foreign country." Act of Mar. 4, 1915, ch. 176, § 1, 38 Stat. 1196, 1197. Although this language was revised in 1978 as part of a recodification of the Interstate Commerce Act and other transportation statutes, Act of Oct. 17, 1978, Pub. L. No. 94-473, § 10501, 92 Stat. 1337, 1359, Congress explicitly stated that the recodification was not intended to alter the statute's substantive meaning. *Id.*, § 3(a), 92 Stat. 1337, 1466; *see* H.R. REP. NO. 1395, 95th Cong., 2d Sess. 9 (1978), *reprinted in* 1978 U.S.C.C.A.N. 3009, 3018. Moreover, in the Staggers Rail Act, Congress authorized the Surface Transportation Board to exempt "transportation that is provided by a rail carrier as part of a continuous intermodal movement," Pub. L. No. 96-448, § 213, 94 Stat. 1895, 1913 (currently codified at 49 U.S.C. § 10502(f)), which the Board has done, *see* 49 C.F.R. § 1090.2.

Although COGSA does not apply by its terms to the land segment of intermodal shipments, it permits parties to an overseas through bill of lading to extend its terms by agreement to transportation both before the loading of an ocean carrier and after its discharge. 46 U.S.C. § 30701 Note § 7. In addition, the Federal Maritime Commission, which administers COGSA, regulates the rates charged by ocean carriers "on any through transportation route." 46 U.S.C. § 40501(a)(1); *see* also *Surface Transp. Bd. (S.T.B.) Improvement of TOFC/COFC Regulations*, 3 I.C.C.2d 869, 883 (1987) ("Ocean carriers providing joint TOFC/COFC [container] service with rail car-

riers and motors carriers may file joint through rates in tariffs with the FMC but they should not file them with [the Surface Transportation Board] . . . .").

B. The Rise of International Intermodal Transportation and the Increasing Use of Through Bills of Lading

Historically, goods imported from overseas were transported using different modes of transportation (*e.g.*, sea, rail, or truck) and each segment of transportation was subject to independent contractual arrangements. For example, a foreign exporter or manufacturer might have contracted separately with a foreign land carrier to transport goods to a foreign port, with an ocean carrier to transport the goods from that port to a domestic port, and (through a forwarder or consignee) with a domestic land carrier to transport the goods to their final destination. Because there was no single carrier responsible for providing all segments of transportation, each carrier would issue a separate "bill of lading," a document that "records that a carrier has received goods from the party that wishes to ship them, states the terms of carriage, and serves as evidence of the contract of carriage." *Norfolk So. Ry. Co. v. Kirby*, 543 U.S. 14, 18-19 (2004).

In recent decades, shipping practices have changed as a result of an innovation that has been termed "the container revolution." *See NLRB v. Int'l Longshoremen's Ass'n*, 447 U.S. 490, 493-94 & n.2 (1980). Containers are large, reusable metal receptacles that generally range in length from 20 to 40 feet and are capable of carrying more than 30,000 pounds of freight. *Id.* at 494. These containers can be moved on and off an ocean vessel, and transferred unopened to trains or trucks for inland transportation. *Id.*

Such containers substantially reduce handling costs because goods inside a container do not require separate offloading and repacking at the seaport, and because a container ship can be loaded or unloaded much more quickly than a conventional ship. *Id.* at 494-95.

The use of containers has altered contracting practices. Instead of contracting with separate carriers for each leg of an overseas shipment, cargo owners now can "contract for transportation across oceans and to inland destinations in a single transaction" covering all legs of the voyage. *Kirby*, 543 U.S. at 26. When a carrier enters into such a contract, it issues a single "through" bill of lading covering all ocean and land carriage, rather than any separate bills of lading for the overseas and domestic legs. *See, e.g.*, 1 THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 10-4, at 598 (4th ed. 2009). Such through bills reduce costs by allowing the contracting carrier to choose the least expensive form of ground transportation. *Id.*

C. The Shipments at Issue

In this case, petitioner Kawasaki Kisen Kaisha, Ltd. ("'K' Line"), an ocean carrier, contracted with foreign shippers to carry their goods from various ports in China via the port of Long Beach, California to destinations in the Midwest. Pet. App. 2a. When "K" Line received containers of cargo from the foreign shippers in China, it issued "through" bills of lading providing for both ocean transportation from China and land transportation from Long Beach to the Midwest destinations. *Id.* These bills of lading contained a provision extending COGSA to cover the land transportation. Pet. App. 6a ("Carrier's responsibilities during the entire period . . . from the time of

receipt of Goods to the time of delivery of Goods shall be governed by [COGSA]."); *see also* Pet. App. 6a (authorizing "K" Line to "subcontract on any terms whatsoever"). The bills also contained a forum selection clause requiring that any actions against "K" Line concerning the carriage of goods "be brought before the Tokyo District Court in Japan." Pet. App. 5a; *see also* Pet. App. 6a (extending terms of the bills of lading to downstream parties and carriers performing services contemplated by the bills).

"K" Line's agent in the United States, petitioner K-Line America, Inc. ("KAM"), arranged for United Pacific Railroad Company ("Union Pacific") to transport the cargo by rail from Long Beach to the Midwest. Pet. App. 7a. Because this rail transportation was made pursuant to a private contract, no separate bill of lading was issued by Union Pacific. *Id.* The containers were safely delivered to Union Pacific in Long Beach, but the train containing them derailed in Oklahoma, and the cargo allegedly was damaged. *Id.*

D. The Proceedings Below

Respondents are consignees and insurers of the cargo allegedly damaged in the Oklahoma derailment. They sued "K" Line, KAM, and Union Pacific in California state court for the alleged damage to their goods. Pet. App. 7a. After the case was removed to federal court based upon federal question jurisdiction, "K" Line, KAM, and Union Pacific moved to dismiss pursuant to the forum selection clauses in the bills of lading designating Tokyo as the exclusive forum for suits relating to the bills. Pet. App. 7a-8a. Respondents argued that the forum selection clauses were unenforceable because the Carmack Amendment applies to the bills of lading and its venue

provision is exclusive. Finding otherwise, the district court granted the motion to dismiss. Pet. App. 8a. On appeal, the Ninth Circuit held Carmack applicable and vacated the judgment. Pet. App. 31a-35a. *But see* Pet. App. 35a (remanding to consider whether "K" Line offered alternative Carmack terms in the bills of lading).

In finding the Carmack Amendment applicable, the Ninth Circuit deemed "K" Line a "rail carrier," even though "K" Line is an ocean carrier, because the goods in question were transported by rail under through bills of lading issued by "K" Line. Pet. App. 12a-17a. In addition, relying upon its own precedent, the Ninth Circuit held that Carmack governs the through bills of lading because Carmack applies "to 'shipments to or from overseas ports' without any requirement for a separate domestic bill of lading for the inland carriage." Pet. App. 17a (quoting *Neptune Orient Lines, Ltd. v. Burlington N. & Santa Fe Ry. Co.*, 213 F.3d 1118, 1119 (9th Cir. 2000)). Finally, the Ninth Circuit held that "K" Line had not opted out of Carmack by entering into a private contract with Union Pacific for rail service because in its view Section 10709 does not apply to exempt transportation, and Section 10502 permits rail carriers providing such transportation to opt out only if they offer Carmack terms. Pet. App. 26a-35a; *see also* Pet. App. 28a (requiring an offer to the cargo owners rather than "K" Line, the party actually contracting for rail service).

The Ninth Circuit conceded that, in holding that the Carmack Amendment applies to an overseas through bill of lading, it was taking a minority view held only by the Second Circuit, and acknowledged "[c]ontrary holdings in the Fourth, Sixth, Seventh,

and Eleventh Circuits." Pet. App. 18a. Quoting from the Eleventh Circuit's decision in *Altadis USA, Inc. v. Sea Star Line, LLC*, 458 F.3d 1288 (11th Cir. 2006), the Ninth Circuit noted that these other circuits "have held that 'the Carmack Amendment does not apply to a shipment from a foreign country to the United States . . . unless the domestic overland leg is covered by a separate bill of lading.'" Pet. App. 17a (quoting *Altadis*, 458 F.3d at 1291) (emphasis omitted)). While finding the majority view foreclosed by prior circuit precedent, Pet. App. 17a, the Ninth Circuit did not state that it considered that precedent correct, nor how its ruling could be reconciled with Carmack's text or history.

REASONS FOR GRANTING THE WRIT

In the last several decades, international shipping has been revolutionized by the development of containers that can be placed in ocean-going vessels and then transferred to railroad cars or trucks without unloading their contents. As a result of this "container revolution," a significant percentage of the goods imported into this nation is now shipped under "through" bills of lading that provide for both ocean and land transportation.

This case presents an important and recurring question concerning such arrangements: whether the inland leg of transportation under an ocean carrier's through bill of lading is subject to the provisions of the Carmack Amendment, even when no separate domestic bill of lading is issued. The circuits are deeply divided over this question: The Ninth Circuit held below, in accord with the Second Circuit, that Carmack does apply in that situation, but four other circuits (the Fourth, Sixth, Seventh and Eleventh) have held that it does not. As this Court recognized

in granting certiorari two Terms ago in *Altadis USA, Inc. v. Sea Star Line, LLC*, 549 U.S. 1106 (2007), this question is of fundamental importance to the transportation industry, and the entrenched circuit conflict over it should be resolved.

This Court should grant this petition as well as the separate petition for certiorari filed by Union Pacific Railroad Company from the same judgment, and consolidate both petitions for argument.

I. THE NINTH CIRCUIT'S DECISION APPLYING THE CARMACK AMENDMENT TO THE INLAND LEG OF AN INTERMODAL SHIPMENT ORIGINATING OVERSEAS THAT MOVED SOLELY UNDER A "THROUGH" BILL OF LADING CONFLICTS WITH THE DECISIONS OF FOUR OTHER CIRCUITS.

The conflict among the circuits over application of Carmack to the inland leg of an overseas shipment under a "through" bill of lading is well-recognized. It has been observed by commentators,[1] the Solicitor

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[1] *See, e.g.*, 1 SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 10-4, at 598 (4th ed. 2004) (observing that "the applicability of the Carmack Amendment to the inland leg of multimodal transportation is in dispute"); William C. Baldwin, Note, *Land Versus Sea; Carmack v. COGSA: Why the Carmack Amendment Should Not Apply to Inland Portions of Multimodal Shipments*, 82 Tul. L. Rev. 731, 734 (2007) (noting the current "four-to-two circuit split"); Michael E. Crowley, *The Limited Scope of the Cargo Liability Regime Covering Carriage of Goods by Sea*, 79 TUL. L. REV. 1461, 1485-86 (2005) (same).

General,[2] and the decision below, which noted that four circuits have held that Carmack does not apply to such through bills of lading and that one other circuit "has disagreed." Pet. App. 18a. Nevertheless, the Ninth Circuit reaffirmed its minority view that Carmack applies to the domestic leg of overseas shipments under through bills of lading. Thus, the conflict among the circuits over this issue (which encompasses nearly all the maritime circuits) is firmly entrenched and unlikely to be resolved absent this Court's intervention.

The decision below conflicts with the Eleventh Circuit's decision in *Altadis USA, Inc. v. Sea Star Line, LLC*, 458 F.3d 1288 (11th Cir. 2006), which this Court granted certiorari to review two Terms ago. In *Altadis*, the plaintiff contracted with an ocean carrier to transport cigars by sea from Puerto Rico to Jacksonville, Florida and then by land to Tampa, Florida; and a single through bill of lading was issued for the entire transportation. *See* 458 F.3d at 1289. The cigars were stolen from a truck en route from Jacksonville to Tampa, and the cargo owner sued the ocean carrier and the trucking company. *Id.* at 1290. When the defendants moved to dismiss based upon the one-year limitations period in COGSA, *see* 46 U.S.C. § 30701 Note § 3(6), which the bill of lading expressly extended to cover the land leg, the cargo owner argued that the Carmack Amendment applied and preempted the one-year limitations period. 458 F.3d at 1290. The Eleventh Circuit disagreed and

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[2] *See* Br. of the United States as *Amicus Curiae* at 11, *Kirby v. Norfolk So. Ry. Co.*, No. 02-1025 (U.S. Nov. 14, 2003) ("It is unsettled whether the Carmack Amendment applies to land transportation under international multimodal through bills of lading.").

held that "the Carmack Amendment does not apply to a shipment from a foreign country to the United States . . . unless the domestic, overland leg is covered by a separate bill of lading." *Id.* at 1291.

The Seventh Circuit also has held that the Carmack Amendment does not apply to the inland leg of a shipment originating overseas under a through bill of lading. In *Capitol Converting Equipment, Inc. v. LEP Transport, Inc.*, 965 F.2d 391 (7th Cir. 1992), an ocean carrier issued a through bill of lading for transporting machinery by sea from Italy to Norfolk, Virginia and then by land to Chicago, Illinois. *Id.* at 392-93. When the machinery failed to arrive, the cargo owner sued the transporter that arranged the shipment. *Id.* at 393. When the transporter invoked a provision in its invoice limiting liability, the cargo owner argued that Carmack applied to the shipment and invalidated the limitation provision. *Id.* The Seventh Circuit disagreed, holding that Carmack "does not extend to shipments by water, rail or motor carrier from a foreign country to the United States . . . unless a domestic segment of the shipment is covered by a separate domestic bill of lading." *Id.* at 394.

The Fourth and Sixth Circuits likewise have held that the Carmack Amendment does not apply to overseas shipments under a "through" bill of lading. In *Shao v. Link Cargo (Taiwan) Ltd.*, 986 F.2d 700 (4th Cir. 1993), the Fourth Circuit held that Carmack "does not extend . . . to shipments from a foreign country to the United States unless a domestic segment of the shipment is covered by a separate domestic bill of lading." *Id.* at 703. Similarly, in *American Road Service Co. v. Consolidated Rail Corp.*, 348 F.3d 565 (6th Cir. 2003), the Sixth Circuit held that Carmack "does not extend to a shipment under a

through bill of lading unless a domestic segment of the shipment is covered by a separate domestic bill of lading." *Id.* at 568.

These rulings cannot be reconciled with the decision below. Like *Altadis*, *Capitol Converting*, *Shao*, and *American Road Service*, this case involves an overseas shipment under a through bill of lading. When the cargo owners here sued for alleged damages caused during the inland leg of the shipment, defendants moved to dismiss under a forum selection clause, and the owners argued that Carmack invalidated the clause. Pet. App. 11a-12a. In the decision below, the Ninth Circuit held that the Carmack Amendment applies "to shipments to or from overseas ports without any requirement for a separate domestic bill of lading for the inland carriage." Pet. App. 18a (quotation omitted). As the Ninth Circuit acknowledged, this holding is "[c]ontrary [to] the holdings in the Fourth, Sixth, Seventh, and Eleventh Circuits" in the cases discussed above. Pet. App. 18a.

As the decision below also observed, there is one circuit, the Second Circuit, that similarly has applied the Carmack Amendment to an overseas shipment under a through bill of lading. Pet. App. 18a. In *Sompo Japan Insurance Co. v. Union Pacific Railway Co.*, 456 F.3d 54 (2d Cir. 2006), an ocean carrier agreed to transport tractors by sea from Tokyo to Los Angeles and by land from Los Angeles to Georgia, and issued a through bill of lading that extended COGSA to the entire transportation. *Id.* at 56. The tractors were damaged when the train derailed in Texas, and the cargo owner sued the railroad that had subcontracted to provide the land transportation. When the railroad invoked COGSA's limitation on per package liability, 46 U.S.C. § 30701 Note § 4(5),

the cargo owner argued that Carmack applied and rendered the limitation void. 456 F.3d at 56-57. Expressly rejecting the Seventh Circuit's decision in *Capitol Converting* as well as the Fourth Circuit's decision in *Shao*, 456 F.3d at 61-63 & n.11, the Second Circuit held that "Carmack applie[d] to the domestic interstate leg" of transportation despite the absence of any separate bill of lading for that leg. *Id.* at 61, 69.

Thus, six circuits have considered whether the current version of the Carmack Amendment applies to the inland leg of overseas shipments moving solely under a through bill of lading, and they are deeply split: two hold that Carmack applies while four hold that it does not. Moreover, it is unlikely that further consideration by the lower courts will clarify this issue. With the exception of the Fifth Circuit, all of the major maritime circuits have considered the issue, and the reaffirmation of the Ninth Circuit's minority view demonstrates that the conflict among these circuits is unlikely to work itself out absent this Court's intervention.

II. THE NINTH CIRCUIT ERRED IN APPLYING THE CARMACK AMENDMENT, WHICH REGULATES DOMESTIC RAIL AND MOTOR CARRIERS, TO AN INTERMODAL SHIPMENT ORIGINATING OVERSEAS THAT MOVED SOLELY UNDER A "THROUGH" BILL OF LADING ISSUED BY AN OCEAN CARRIER.

In addition to contradicting the decisions of four other circuits, the decision below misconstrued the Carmack Amendment. Carmack addresses the liability of rail and motor carriers. It is not intended to govern shipments from overseas under through bills

of lading, much less to govern the liability of an ocean carrier that expressly contracted to have its responsibilities governed by COGSA, not Carmack.

The Carmack Amendment does not apply to shipments that originate overseas under through bills of lading issued by ocean carriers. In interpreting a statute, courts "look first to its language, giving the words their ordinary meaning." *Moskal v. United States*, 498 U.S. 103, 108 (1990) (citations and quotation marks omitted); *see Burlington N. & Santa Fe Ry. Co. v. United States*, 129 S.Ct. 1870, 1878 (2009). Carmack, as currently codified, imposes liability upon a "rail carrier" that is "providing transportation or service subject to the jurisdiction of the [Surface Transportation] Board" for any loss or injury to the property it is transporting caused by it or by another rail carrier transporting the property. 49 U.S.C. § 11706(a). This language plainly does not contemplate suits against ocean carriers for shipments that originate overseas.

First, "K" Line is not a "rail carrier" subject to the jurisdiction of the Surface Transportation Board. *See* 49 U.S.C. § 10501(a)(1) ("The Board has jurisdiction over transportation by rail carrier."). "K" Line is an "ocean common carrier" because it offers transportation of goods on the high seas to the general public. 46 C.F.R. § 520.2. It does not act as rail common carrier because it does not provide rail transportation to the general public—it privately subcontracts for rail services as needed to fulfill its obligations under through bills of lading—and therefore does not qualify as a rail carrier under the Interstate Commerce Act and Carmack. *See* 49 U.S.C. § 10102(5) (defining "rail carrier" to mean a person providing "*common carrier* railroad transportation" (emphasis

added)); *see also* WEBSTER'S THIRD NEW INT'L DICTIONARY 458 (2002) (defining "common carrier" in the federal regulatory context to mean a carrier "offering services to all comers"). In addition, "K" Line is regulated by the Federal Maritime Commission, not the Surface Transportation Board, even when providing "through transportation with inland carriers." 46 C.F.R. § 520.1(a); *see also Surface Transp. Bd. (S.T.B.) Improvement of TOFC/COFC Regulations*, 3 I.C.C.2d 869, 883 (1987) (noting ocean carriers that provide container service with rail transportation file tariffs with the Federal Maritime Commission, not the Surface Transportation Board). Thus, "K" Line is not a "rail carrier," and Carmack does not apply.

Second, the Carmack Amendment does not apply to through bills of lading for transportation originating overseas. Under Carmack's venue provision, claims under Carmack may be brought against "the originating rail carrier" only "in the judicial district in which the point of origin is located." 49 U.S.C. § 11706(d)(2)(A)(i). "Judicial district" in turn is defined to mean the geographic region over which federal district courts or state courts exercise jurisdiction. *Id.* § 11706(d)(2)(B). But when an ocean carrier such as "K" Line issues a bill of lading for a shipment originating overseas, the "point of origin" is overseas, where no federal district court or state court exercises jurisdiction. Thus, Carmack does not apply to shipments originating overseas.

Indeed, prior to codification of the Interstate Commerce Act in 1978, the Carmack Amendment was expressly limited to transportation originating in the United States. Before codification, Carmack's only application outside the United States was to transportation "from any point in the United States to a

point in an adjacent foreign country." Act of Mar. 4, 1915, ch. 176 § 1, 38 Stat. 1196, 1197 (later codified at 49 U.S.C. § 20(11) (1977)). Thus, courts,[3] the agency originally responsible for administering Carmack,[4] and a treatise on common carriers from the time this language was enacted[5] all recognized that the pre-codification Carmack did not apply to shipments from or to overseas destinations. Because Congress intended the codification of the Interstate Commerce Act to be "without substantive changes," Act of Oct. 17, 1978, Pub. L. No. 94-473, § 3(a), 92 Stat. 1337, 1466; *see* H.R. REP. NO. 1395, 95th Cong., 2d Sess. 9 (1978), *reprinted in* 1978 U.S.C.C.A.N. 3009, 3018, the codified version of Carmack also must be interpreted not to apply to shipments originating outside of the United States. *See, e.g., John R. Sand &*

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[3] *See, e.g., Sklaroff v. Penn. R.R. Co.*, 184 F.2d 575, 575 (3d Cir. 1950) (holding the Carmack Amendment inapplicable to shipment originating in Canada made under a through bill of lading); *Strachman v. Palmer*, 177 F.2d 427, 429-30 (1st Cir. 1949) (same); *Alwine v. Pa. R.R. Co.*, 15 A.2d. 507, 509-10 (Pa. 1940) (same); *Dexter & Carpenter, Inc. v. Davis*, 281 F. 385, 388 (4th Cir. 1922) (holding Carmack inapplicable to shipment to Europe on through bill of lading); *see also Reider v. Thompson*, 339 U.S. 113, 117 (1950) (applying Carmack Amendment to inland leg of shipment from Argentina because "there was no through bill of lading from Buenos Aires to Boston").

[4] *See In re Cummings Amendment*, 33 I.C.C. 682, 693 (1915) (finding that the Carmack Amendment, as amended in 1915, does not cover "import shipments to and from foreign countries not adjacent to the United States" because Carmack "makes no reference to shipments . . . from a nonadjacent foreign country").

[5] *See* 1 M. G. ROBERTS, FEDERAL LIABILITIES OF CARRIERS § 360, at 710 (2d ed. 1929) (noting that carriers "engaged in transporting property in foreign commerce other than to adjacent foreign countries, are not included" in the Carmack Amendment).

Gravel Co. v. United States, 128 S. Ct. 750, 754-55 (2008).

This conclusion also follows from this Court's unanimous decision in *Norfolk Southern Railway Co. v. Kirby*, 543 U.S. 14 (2009). *Kirby* involved facts remarkably similar to those here. In that case, goods were transported from a foreign country to a port in the United States and then delivered to a rail carrier pursuant to through bills of lading issued by an ocean carrier that extended COGSA to govern the inland leg of the transportation. *Id.* at 21. When the train derailed, the goods were damaged, and the cargo owner and its insurer sued the railroad, which in turn invoked the COGSA package limitation provision incorporated into the bills. *Id.* at 21-22. *Kirby* held that the ocean carrier's through bill of lading was a maritime contract governed by COGSA, which applied to both the ocean and land legs of the transportation. *Id.* at 24. While the Court did not expressly discuss potential application of the Carmack Amendment, it upheld application of COGSA and the limitation provision, emphasizing that "[c]onfusion and inefficiency will inevitably result if more than one body of law governs a given contract's meaning." *Id.* at 29.

The Ninth Circuit's application of Carmack to the inland leg of a shipment under a through bill of lading cannot be reconciled with *Kirby*. Under the decision below one statute, COGSA, applies to the ocean leg and another, the Carmack Amendment, to the land leg of an intermodal shipment under a single through bill of lading that states that the carriers' liability shall be governed by only one statute, COGSA. This ruling casts doubt upon the applicable standard of liability—because COGSA bases liability

upon negligence and Carmack upon strict liability—and upon the enforceability of provisions such as the forum selection clause. *See supra* pp. 4-5 (contrasting COGSA and Carmack). Thus, the interpretation adopted by the decision below creates exactly the sort of "uncertainty and . . . lack of uniformity" that *Kirby* sought to prevent. *Altadis*, 458 F.3d at 1293; *see Indem. Ins. Co. of N. Am. v. Hanjin Shipping Co.*, 348 F.3d 628, 633 (7th Cir. 2003) (applying one law to a shipment makes "eminent good sense, as compared with the inefficient alternative of applying different substantive law to the container depending on whether it is sitting on board a ship, on a rail car, or on a truck").

The Ninth Circuit failed to offer any persuasive reason for construing the Carmack Amendment to apply to shipments originating overseas made under through bills of lading issued by an ocean carrier. The decision below did not attempt to reconcile its application of Carmack to an overseas through bill of lading with the language, structure, and history of Carmack or the policy of uniformity recognized in *Kirby*. Instead, it relied upon a prior Ninth Circuit decision, *Neptune Orient Lines, Ltd. v. Burlington Northern & Santa Fe Railway Co.*, 213 F.3d 1118, 1119 (9th Cir. 2000), which applied Carmack to the inland leg of an overseas shipment without any explanation. *Id.* at 1119.

Although the Second Circuit's decision in *Sompo* discussed the language of the Carmack Amendment, it did not consider whether Carmack applies to ocean carriers, and a subsequent Second Circuit decision held that it does not. *See Rexroth Hydraudyne B.V. v. Ocean World Lines, Inc.*, 547 F.3d 351, 355-64 (2d Cir. 2008). Moreover, in holding that prior to codi-

fication Carmack applied to overseas shipments, *see Sompo*, 456 F.3d at 65-69, the Second Circuit admittedly failed to reconcile its holding with the plain language of Carmack (*see id.* at 66, 68 n.13), and largely ignored the contemporaneous authority to the contrary. *See supra* p. 19 nn. 3-5.[6]

Finally, even if the Carmack Amendment could apply to shipments from overseas under a through bill of lading, it still would not apply to the inland transportation here because Congress permits rail carriers to enter into contracts for private carriage that are not subject to the rail provisions of the Interstate Commerce Act. *See* 49 U.S.C. § 10709(c). *See generally Babcock & Wilcox v. Kansas City So. Ry. Co.*, 557 F.3d 134, 138 (3d Cir. 2009). The Ninth Circuit held that this provision does not apply to types of transportation that have been exempted and that Section 10502 applies to private contracts for

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[6] The *Sompo* decision construed Carmack before codification based on this Court's decision in *Galveston, Harrisburg & San Antonio Ry. Co. v. Woodbury*, 254 U.S. 357 (1920). *See Sompo*, 456 F.3d at 65-67. *Woodbury*, however, construed Section 1 of the Interstate Commerce Act, not the Carmack Amendment. *See Woodbury*, 254 U.S. at 359-60. The language of Section 1 at issue in *Woodbury* was similar to the Carmack Amendment's before codification. *See id.* at 359 (noting Section 1 conferred jurisdiction over transportation "from any place in the United States to an adjacent foreign country"). But while *Woodbury* was pending, Congress amended Section 1 to clarify that it applies to importing as well as exporting of goods. *See* Act of Feb. 28, 1920, sec. 400, 41 Stat 456, 474 (1920) (providing the Interstate Commerce Commission with jurisdiction over transportation "from *or to* any place in the United States *to or from* a foreign country, but only insofar as such transportation . . . takes place within the United States") (emphasis added). As no similar amendments was made to Carmack, Congress plainly intended Carmack to be narrower.

such transportation. Pet. App. 26a-35a. There is nothing in Section 10709, however, suggesting an exception for types of transportation that have been exempted. *See* 49 U.S.C. § 10709 (providing that "[o]ne or more rail carriers . . . may enter into a contract with one or more purchases of rail services"). Nothing in Section 10502 suggest that it applies to private contracts for exempt transportation: that Section simply notes that nothing "shall prevent rail carriers from offering alternative terms for exempt transportation." *Id.* § 10502(e). Moreover, there is no reason to believe that Congress intended to make it *harder* for carriers providing exempt transportation to enter into private contracts free from Carmack's requirements. For this reason as well, the Ninth Circuit erred in applying the Carmack Amendment.

III. THE NINTH CIRCUIT'S DECISION PRESENTS AN ISSUE OF EXCEPTIONAL IMPORTANCE TO THE TRANSPORTATION INDUSTRY.

As this Court recognized in granting certiorari in *Altadis*, the question presented there and again here warrants this Court's review. The volume and value of goods transported overseas under through bills of lading is rapidly increasing. From 1995 to 2006, the volume of maritime container traffic has more than doubled from 22.6 million twenty-foot equivalent units (TEUs), to 46.3 million TEUs, U.S. DEP'T OF TRANSP., BUREAU OF TRANSP. STATISTICS, *America's Container Ports: Delivering the Goods* 2 (March 2007), and the volume of imports is increasing even more quickly, having nearly doubled between 2000 and 2005, *id.* at 3, 10; *see also* U.S. DEP'T OF TRANSP., MARITIME ADMIN., *U.S. Water Transportation Statis-*

tical Snapshot 1 (May 2008) (noting 45.3% increase in volume of container imports between 2002 and 2006). Correspondingly, the volume of intermodal transportation has rapidly increased as well: Between 1993 and 2002, the value of goods shipped with intermodal transportation in the United States increased from $665 billion to $1.1 trillion. U.S. DEP'T OF TRANSP., BUREAU OF TRANSP. STATISTICS, *Freight Shipments in America: Preliminary Highlights from the 2002 Commodity Flow Survey* 7 (2004). Moreover, because international shipments are typically made under intermodal through bills of lading, *see Kirby*, 543 U.S. at 25 (noting the "popularity of 'through bills of lading"); *see also* U.S. DEP'T OF COMMERCE, INT'L TRADE ADMIN., *A Basic Guide to Exporting* 143 (10th ed. 2008) ("International shipments are increasingly made on a through bill of lading under a multimodal contract."), the overseas bills of lading at issue in this petition affect a significant and rapidly growing portion of the economy.

The conflict among nearly all the maritime circuits over the law governing the land leg of these shipments creates uncertainty for shippers and carriers that extends to issues of fundamental importance to contracts in this area. For example, while the Carmack Amendment imposes essentially strict liability upon carriers, *see* 49 U.S.C. §§ 11706(a), 14706(a), COGSA bases liability upon negligence, *see* 46 U.S.C. § 30701 Note § 4. But bills of lading issued by ocean carriers routinely extend COGSA by contract to through bills of lading to cover the inland portions of overseas shipments. *See, e.g. Starrag v. Maersk, Inc.*, 486 F.3d 607, 614 (9th Cir. 2007). Thus, uncertainty over Carmack's applicability to the inland leg of an ocean carrier's through transportation creates uncertainty over the standard under which carriers will be held

liable, which in turn creates uncertainty over the prices that should be charged and the insurance that should be sought.

In addition, because the Carmack Amendment invalidates forum selection clauses and other provisions commonly included in bills of lading, *see Aaacon Auto Transp., Inc. v. State Farm Mut. Auto. Ins. Co.*, 537 F.2d 648, 654 (2d Cir. 1976) (holding Carmack's venue provision exclusive), uncertainty over Carmack's application to the land leg of shipments under international through bills of lading creates uncertainty about the enforceability of bills of lading, which typically are the parties' only contract of carriage. This uncertainty is compounded by the limits that the Ninth Circuit has imposed upon the ability of carriers to enter into private contracts with purchasers of rail services that are outside the scope of the Interstate Commerce Act and therefore of Carmack. As this Court has recognized, such uncertainty is especially destructive in the international trade context, as contracts for international intermodal transportation of goods to the United States may be made anywhere in the world. *Kirby*, 543 U.S. at 28.

This case is an excellent vehicle for dispelling the uncertainty over Carmack's application to the land leg of transportation under international through bills of lading. The question is squarely presented, and the facts material to Carmack's application are undisputed. Moreover, reversal of the decision below may be outcome determinative: If Carmack does not apply, the bill of lading's forum selection clause is enforceable and the case should be dismissed.

In addition, this petition, if granted and consolidated with the petition from the same judgment filed by the Union Pacific, would allow the Court to con-

sider the full array of issues affecting the application of the Carmack Amendment to international through bills of lading. This case involves claims against both an ocean carrier and a railroad; the shippers' contracts with the ocean carrier—the through bills of lading—extend COGSA to cover land transportation; and the ocean carriers and the railroad privately subcontracted pursuant to Section 10709 for land transportation. Thus, this case is an excellent vehicle for resolving in its broadest context the issue that this Court sought to address in *Altadis* but was prevented from reaching by the parties' settlement.

CONCLUSION

This Court should grant this petition as well as the separate petition for certiorari filed by the Union Pacific Railroad Company from the same judgment, and consolidate both petitions for argument.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

REGAL-BELOIT CORPORATION; Victory Fireworks, Inc.; PICC Property & Casualty Company Limited Shanghai Branch; Royal Sun Alliance Insurance Co. Ltd., Plaintiffs-Appellants,

v.

KAWASAKI KISEN KAISHA LTD.; K-Line America, Inc.; Union Pacific Railroad Company, Defendants-Appellees.

No. 06-56831

Argued and Submitted: June 1, 2008.
Filed: Feb. 17, 2009.

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557 F.3d 985

Appeal from the United States District Court for the Central District of California, Dale S. Fischer, District Judge, Presiding. D.C. No. CV-06-03016-DSF.

Before: STEPHEN TROTT, SIDNEY R. THOMAS and RAYMOND C. FISHER, Circuit Judges.

ORDER

The opinion filed February 4, 2009 is withdrawn.

OPINION

FISHER, Circuit Judge:

This case requires us to determine which federal statute governs "a maritime case about a train wreck," where the parties' agreement for carriage of goods from China into the United States by sea and then by rail included a Tokyo forum selection clause that would violate one federal law, but would be enforceable under another. *See Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14, 18, 125 S.Ct. 385, 160 L.Ed.2d 283 (2004). Regal-Beloit and several other named plaintiffs contracted with defendant Kawasaki Kisen Kaisha, Ltd. ("K-line") to ship their goods from China to various American Midwestern destinations via the Port of Long Beach in California.[1] K-line issued a through bill of lading to each shipper to cover the shipment from China all the way to the inland destinations, designating the Carriage of Goods by Sea Act as the law to govern the carriers' responsibility during the entire shipment.

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[1] Plaintiffs in this case include the following parties: Regal-Beloit is a non-California corporation with an office in Beloit, Wisconsin that purchased a cargo of electric motors to be shipped from Shanghai, China to Indianapolis, Indiana; Victory is a corporation authorized to do business in California with an office in Ellsworth, Wisconsin that purchased a cargo of fireworks to be shipped from Beihai, China to Minneapolis, Minnesota; PICC is a foreign insurance corporation with an office in Shanghai that was the subrogated insurer of a cargo of electric motor parts to be shipped from Shanghai, China to Milwaukee, Wisconsin; and Royal & Sun was the subrogated insurer of a cargo of retainer nail castings to be shipped from Zhangjiagang, China to Chicago, Illinois. Actions brought by the above plaintiffs were consolidated under Regal-Beloit's named complaint on August 7, 2006. All shipments entered the United States via the Port of Long Beach. We generally refer to the plaintiffs collectively as "Plaintiffs." We also generally refer to defendants Kawasaki Kisen Kaisha, Kline America and Union Pacific Railroad Company as "Defendants."

Although K-line's own ocean liner carried the goods from China to Long Beach, its United States agent, K-line America ("KAM"), subcontracted with United Pacific Railroad Company ("UPRR") to transport these goods from Long Beach to the inland destinations. K-line is KAM's corporate parent, handling its domestic business dealings through KAM, including dispatching and receiving vessels and negotiating its inland shipping with domestic carriers like UPRR. Plaintiffs' cargo was allegedly damaged when UPRR's train derailed in Oklahoma. Plaintiffs filed a breach of contract suit against Defendants in California Superior Court. After UPRR removed the case to the district court, K-line and KAM moved to dismiss under the Tokyo forum selection clause in K-line's initial agreement with Plaintiffs. The district court granted the motion to dismiss, determining that the parties successfully avoided the strict venue limitations that apply by default to the rail portions of these shipments as a matter of federal law under the Carmack Amendment. The dismissal provides us jurisdiction under 28 U.S.C. § 1291.

The outcome of this case turns on the answers to two questions, the *first* being which statutory framework should apply: the Carmack Amendment ("Carmack"), which provides the default rules governing the inland rail leg of a shipment between a foreign country and a point in the United States, or the Carriage of Goods by Sea Act ("COGSA"), which is what the parties contractually agreed would govern?[2]

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[2] Carmack has been codified at several different sections of Title 49 since its enactments. "Originally codified at 49 U.S.C. § 20(11), Carmack was recodified in 1978 at 49 U.S.C. § 11707 and then recodified again in 1996 at 49 U.S.C. § 14706. The current version of Carmack is codified at 49 U.S.C. § 11706." *Sompo Japan Ins.*

A reasonable forum selection clause typically is enforceable under COGSA, but such a clause is valid under Carmack *only* if the parties fulfill one of Carmack's two statutory methods for contracting out of the statute's venue restrictions. Applying this circuit's precedent dictates that contractually extending COGSA to the inland rail leg cannot trump the statutory force of Carmack's default responsibility regime unless the parties properly agree to opt out of Carmack and thereby remove the statutory barrier to choosing COGSA as the governing law. We therefore reach a *second* question: which of Carmack's two statutory opt out provisions applies to a contract for rail service that, like the contract here, has been exempted from regulation by the Surface Transportation Board? Unlike the district court, we conclude that the applicable requirements for opting out of Carmack are found in 49 U.S.C. § 10502, instead of § 10709. We thus reverse and remand to the district court to determine whether the parties contracted out of Carmack's venue restrictions under § 10502 so as to make the Tokyo forum selection clause valid and enforceable.

BACKGROUND

To ship their goods, Plaintiffs each entered into an intermodal through bill of lading with K-line that covered the entire transport from China to the

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Co. v. Norfolk S. Ry. Co., 540 F.Supp.2d 486, 492 n. 4 (S.D.N.Y.2008) [hereinafter *Sompo II*] (internal citations omitted). COGSA was enacted in 1936 and amended § 25 of former Title 49. In 1981, it was codified as amended as an appendix to Title 46 at 46 U.S.C. §§ 1301-1315. Congress recodified portions of Title 46 of the United States Code as positive law in October 2006, and COGSA is now located in the notes section of 46 U.S.C. § 30701.

Midwest.[3] In pertinent part, the bills of lading included the following provisions:

> 1. **(Definitions & Tariff)** ... (b) 'Carrier' means [K-line], her owners, operators and charterers whether acting as carrier or bailee .... (d) 'Connecting Carrier' means carriers (other than Carrier), contracted by or acting on behalf of Carrier, participating in Carriage of Goods by land, water or air under this Bill of Lading .... (j) 'Vessel' includes the vessel named on the face hereof, any vessel, lighter, barge, ship, watercraft or any other means of water transport and any other vessel owned, operated, chartered or employed (in whole or in part) by Carrier or any Connecting Carrier and used in whole or in part for carriage of Goods under this Bill of Lading.
>
> 2. **(Governing Law and Jurisdiction)** The contract evidenced by or contained in this Bill of Lading shall be governed by Japanese law except as may be otherwise provided for herein, and any action thereunder or in connection with Carriage of Goods shall be brought before the Tokyo District Court in Japan, to whose jurisdiction Merchant irrevocably consents.
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> ....

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[3] A bill of lading is a contract that "records that a carrier has received goods from the party that wishes to ship them, states the terms of carriage, and serves as evidence of the contract for carriage." *Kirby*, 543 U.S. at 18-19, 125 S.Ct. 385. "Through" bills of lading specifically cover both oceanic and inland legs of a journey in a single document. *See id.* at 25-26, 125 S.Ct. 385. "Intermodal" refers to the use of more than one method of transport during a single shipment. *See id.* at 25, 125 S.Ct. 385.

4. **(Responsibility for Shipments To, From or Through U.S. Territories)** (1) With respect to Goods shipped to, from, or through U.S. Territories, Carrier's responsibilities during the entire period (and not just during Water Carriage) from the time of receipt of Goods to the time of delivery of Goods shall be governed by [COGSA] and [COGSA] shall be deemed incorporated herein during the entire aforesaid period .... [4]

5. **(Sub-Contracting: Exemptions, Immunities, Limitations, etc. of Participant(s))** (1) Carrier shall be entitled to sub-contract on any terms whatsoever Carriage, including without limitation, the loading, unloading, storing, warehousing, handling and any and all duties whatsoever undertaken by Carrier in relation to Goods by any of the following: (I) any Connecting Carrier.... (2) ... [E]very such vessel and Such Participant(s) shall have the benefit of all provisions herein benefiting [sic] Carrier as if such provisions were expressly for their benefit; and, in entering into this contract, Carrier, to the extent of those provisions, does so not only on its own behalf, but also as agent and trustee for such vessel and Participant(s).[5]

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[4] A clause such as this, "which identifies the law that will govern the rights and liabilities of all parties to the bill of lading," is often referred to as a "clause paramount." *Sompo Japan Ins. Co. of Am. v. Union Pac. R.R. Co.*, 456 F.3d 54, 56 (2nd Cir.2006) [hereinafter *Sompo I*].

[5] A clause such as this, which extends a bill of lading's defenses and limitations to downstream parties who have subcontracted

K-line's ocean carriers shipped the cargo from China to Long Beach. From there, the cargo was transferred to UPRR, with whom KAM had contracted to transport the cargo from the Port of Long Beach to the various inland destinations. This agreement was memorialized in the Exempt Rail Transportation Agreement ("ERTA"), which explicitly stated that "[l]iability for freight loss and damage to lading while under the control of [UPRR] shall be governed by MITA [the Master Intermodal Transportation Agreement]." The MITA provided that the MITA plus any bills of lading constituted the entire contract between the parties, and included its own forum selection clause that stated that "[a]ll lawsuits for freight loss or damage must be filed in a court of competent jurisdiction in Omaha, Douglas County, Nebraska." The MITA also (1) prohibited the interpretation of its terms under foreign law; (2) explicitly provided that "[t]his MITA and any agreements, price documents or contracts that reference this MITA have been made under 49 U.S.C. § 10709"; and (3) expressly established that "Carmack liability coverage is *not* available for any Shipments that originate outside the borders of the United States of America."

Unfortunately, the UPRR train carrying the aforementioned cargo derailed in Tyrone, Oklahoma. Based on the alleged damage to the cargo, Plaintiffs filed suits against Defendants in Los Angeles County Superior Court. UPRR removed the cases to the Federal District Court for the Central District of California. Once the cases were removed, Defendants moved to dismiss the actions, relying on the Tokyo

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with the Carrier, is often referred to as a "Himalaya clause." *See Kirby*, 543 U.S. at 20 & n. 2, 125 S.Ct. 385.

forum selection clause in the bills of lading. The district court granted their motion. *See Regal-Beloit Corp. v. Kawasaki Kisen Kaisha, Ltd.*, 462 F.Supp.2d 1098, 1105 (C.D.Cal.2006).

The district court concluded that the Tokyo forum selection clause was reasonable, and that KAM and UPRR could enjoy its benefits under the Himalaya Clause. *See id.* at 1102-03. It went on to determine that Carmack's venue restrictions applied neither to the overseas leg of the cargo shipment, which were instead governed by COGSA, nor to the inland leg of the cargo shipment. *See id.* at 1103-04. With respect to the inland leg, the district court explained that although this transport would typically be subject to Carmack's restrictions, here the parties entered into the bills of lading under 49 U.S.C. § 10709, thereby enabling the parties to contract out of the Carmack Amendment's terms. *See id.*

We disagree. Under our case law, Carmack—not COGSA—must govern Defendants' liability for the inland rail transport here. Therefore, Tokyo is an acceptable forum under the provisions of Carmack only if the parties satisfied the applicable requirements under either § 10709 or § 10502 for contracting out of Carmack's default venue restrictions. As we explain below, a careful reading of Carmack reveals that § 10709 does not govern the kind of carriage at issue in this case and the district court therefore erred by applying that section instead of § 10502. Accordingly, we reverse and remand so the district court can determine in the first instance whether the parties complied with § 10502.

STANDARD OF REVIEW

We reject Defendants' argument that we must apply the abuse of discretion standard of review, which

applies only to a district court's factual finding regarding a forum selection clause's reasonableness. *See Kukje Hwajae Ins. Co. v. The "M/V HYUNDAI LIBERTY,"* 408 F.3d 1250, 1254 (9th Cir.2005). Here, the parties concede that the forum selection clause is reasonable. Instead, the dispute turns on which statutory law applies and whether this body of law voids the forum selection clause regardless of its reasonableness. We review these issues of statutory interpretation de novo. *See Chateau des Charmes Wines Ltd. v. Sabate USA Inc.*, 328 F.3d 528, 530 (9th Cir.2003); *Richards v. Lloyd's of London*, 135 F.3d 1289, 1292 (9th Cir.1998) (en banc).

DISCUSSION

I. Statutory Provisions

Because of their centrality to our analysis, we summarize the relevant provisions of Carmack and COGSA before turning to the question of which statute applies here.

Congress added the Carmack Amendment to the Interstate Commerce Act in 1906. Carmack, which governs rail and motor carriers that are under the jurisdiction of the Surface Transportation Board ("the Board," previously referred to as the Interstate Commerce Committee, or "the ICC"), narrowly limits the venues in which a claim against carriers under the Board's jurisdiction may be brought. Carmack dictates that:

> [a] civil action under this section may only be brought (i) against the originating rail carrier, in the judicial district in which the point of origin is located; (ii) against the delivering rail carrier, in the judicial district in which the principal place of business of the person bringing the action is located if the delivering

> carrier operates a railroad or a route through such judicial district, or in the judicial district in which the point of destination is located; and (iii) against the carrier alleged to have caused the loss or damage, in the judicial district in which such loss or damage is alleged to have occurred.

49 U.S.C. § 11706(d)(2)(A). A "judicial district" is defined as "a judicial district of the United States" or "the applicable geographic area over which [a state] court exercises jurisdiction." 49 U.S.C. § 11706(d)(2)(B). Given these restrictions, forum selection clauses are generally forbidden under Carmack. Notably, however, Congress has since added a series of provisions designed to deregulate aspects of the railroad industry. *See Tokio Marine & Fire Ins. Co. v. Amato Motors, Inc.*, 996 F.2d 874, 877 (7th Cir.1993). Collectively referred to as the Staggers Rail Act, these provisions establish two mechanisms by which rail and motor carriers can contract out of Carmack's restrictions if they satisfy the applicable statutory requirements. *See* 49 U.S.C. §§ 10502(a), 10502(e), 10709(a), 10709(c)(1).

By its terms, COGSA covers transport only between a foreign and American port "from the time when the goods are loaded on to the time when they are discharged from the ship"—commonly referred to as "tackle-to-tackle." 46 U.S.C. § 30701 Notes Sec. 1(e). COGSA does, however, explicitly authorize sea carriers and shippers to extend its rules contractually to cover inland transportation or transportation between two American ports. *See* 46 U.S.C. § 30701 Notes Sec. 7, 13. Unlike Carmack, COGSA does not include any venue restrictions that would prohibit the enforcement of a forum selection clause.

II. The Carmack Amendment vs. COGSA

It is undisputed that the responsibility clauses in the bills of lading purport to extend the application of COGSA to the entire period of transport, and that the Himalaya Clause extends the full benefits of the bills of lading to all of the carrier's subcontractors "as if such provisions were expressly for their benefit." Nevertheless, Plaintiffs argue that Carmack's venue restrictions should still govern because Carmack's statutory force "trumps" the parties' attempt to contractually extend COGSA.[6] Defendants respond that Carmack cannot apply to the inland rail carriage because the entire shipment was governed by through bills of lading, whereas a *separate* domestic bill of lading is necessary for Carmack to apply to inland transport. In the alternative, Defendants assert that even if the Carmack Amendment could apply in the absence of a separate bill of lading for the domestic carriage, in this case COGSA should govern in light of

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[6] We reject Plaintiffs' claim that Carmack should automatically apply under the law of the case doctrine because the district court originally denied UPRR's motion to transfer venue by applying Carmack. The district court clarified in a later order that Carmack's venue limiting provision did *not* apply. Even if it had not, the district court's earlier decision would not bind our reasoning under the law of the case doctrine, which generally precludes courts "from reconsidering an issue that has already been decided *by the same court, or a higher court* in the identical case." *United States v. Alexander*, 106 F.3d 874, 876 (9th Cir.1997) (emphasis added). We also reject Plaintiffs' assertion that UPRR conceded Carmack's applicability in its motion to remove the proceedings to federal court. The motion's statement that "[t]he first cause of action in the [complaint] ... contains the elements required to plead a claim against UPRR under the Carmack Amendment," was not a concession that Carmack applies, but instead simply an argument that federal question jurisdiction was appropriate.

the parties' express agreement to extend COGSA's provisions to all subcontractors, as reflected in the bills of lading. Defendants fairly argue that policies recently endorsed by the Supreme Court—such as uniformity in the law of maritime contracts and contractual autonomy for sophisticated shippers and carriers—recommend applying COGSA here. *See Kirby*, 543 U.S. at 29, 125 S.Ct. 385. These policies notwithstanding, according to the statutory language and our holding in *Neptune Orient Lines, Ltd. v. Burlington N. & Santa Fe Ry. Co.*, 213 F.3d 1118 (9th Cir.2000), Carmack supplies the default regime governing the inland rail shipment here. We therefore hold that COGSA applies only if the parties properly opted out of Carmack.

A.

Before we turn to Defendants' joint arguments, we reject the K-line defendants' threshold assertion that Carmack cannot apply to ocean carriers and their agents. To support their argument, however, K-line and KAM quote selectively from Carmack. By its terms, Carmack applies to "[a] rail carrier providing transportation or service subject to the jurisdiction of the Board under this part," 49 U.S.C. § 11706(a), where a "rail carrier" is "a person providing common carrier railroad transportation for compensation." 49 U.S.C. § 10102(5). Critically, the statute goes on to define "railroad" as including "a bridge, car float, lighter, ferry, *and intermodal equipment used by or in connection with a railroad.*" 49 U.S.C. 10102(6)(A) (emphasis added). Moreover, the Board's jurisdiction, which is coextensive with Carmack's coverage, includes "transportation that is by railroad and water, *when the transportation is under common control, management, or arrangement for a continuous carriage or shipment.*" 49 U.S.C. § 10501(a)(1)(B) (emphasis

added). Here, K-line shipped the cargo from China to the Port of Long Beach on K-line's ocean liner, issued bills of lading that covered the cargo from its place of origin to the final destinations in the United States and contracted with UPRR to ship the cargo from the Port of Long Beach to the Midwest through its agent KAM, who acted on K-line's behalf in receiving its vessel and providing for the inland transport. The K-line defendants therefore provided "continuous carriage or shipment" that was "by railroad and water" via "intermodal equipment used by or in connection with a railroad." As a result, Carmack applies to K-line and its agent.

Applying Carmack to K-line is also consistent with the purpose of Carmack's liability regime, which is "to relieve shippers of the burden of searching out a particular negligent carrier from among the often numerous carriers handling ... goods." *Reider v. Thompson*, 339 U.S. 113, 119, 70 S.Ct. 499, 94 L.Ed. 698 (1950). Because Plaintiffs dealt directly with K-line to arrange a shipment that included domestic rail carriage, we uphold Carmack's objectives by applying the statute to K-line and its agent.

Few opinions have squarely addressed the potential application of Carmack to ocean carriers and their agents and no Supreme Court or Ninth Circuit precedent appears to address this issue. Nevertheless, most of the limited federal jurisprudence on this question either states that Carmack applies to an ocean carrier and its agent or implicitly suggests that it could. *See United States v. Miss. Valley Barge Line Co.*, 285 F.2d 381, 391-94 (8th Cir.1960) (Blackmun, J.) (holding that Carmack applied to a water carrier that was the contracting carrier when there was a common arrangement as indicated by a through bill of lading); *Kyodo U.S.A., Inc. v. Cosco N. Am. Inc.*, No. 01-CV-

499, 2001 WL 1835158, at *3-5 (C.D.Cal. July 23, 2001) (holding that Carmack could apply to an ocean carrier); *Canon USA, Inc. v. Nippon Liner System, Ltd.*, No. 90 C 7350, 1992 WL 82509, at *5-8 (N.D.Ill. Apr.17, 1992) (applying Carmack to an ocean carrier); *Nelson v. Agwilines, Inc.*, 70 F.Supp. 497, 500 (S.D.N.Y.1946) (noting that although "[o]rdinarily a carrier that is wholly a carrier by water is not subject to regulation by [the Board,] [m]any carriers by water have through bill of lading arrangements with railroads, which make the carriers by water subject to regulation by [the Board]"). Until recently, only two authorities, neither of which we find persuasive, explicitly held that Carmack does not apply to an ocean carrier: a decision from the Florida Supreme Court and a subsequent decision from the Federal District Court for the Southern District of Florida that relied on the previous state court decision. *See King Ocean Cent. Am., S.A. v. Precision Cutting Servs., Inc.*, 717 So.2d 507, 513 (Fla.1998) (holding that "an ocean carrier's liability was not contemplated or covered under the Carmack Amendment"); *PT Indonesia Epson Indus. v. Orient Overseas Container Line, Inc.*, 219 F.Supp.2d 1265, 1269 (S.D.Fla.2002) (following *King Ocean*'s analysis and determining that "the Carmack Amendment does not necessarily apply to the through bill of lading issued by [the ocean carrier]"); *contra, Kyodo*, 2001 WL 1835158 at *4 (unpublished district court opinion in this circuit explicitly refusing to endorse *King Ocean*'s analysis).

Since this case was argued, however, the Second Circuit has construed Carmack's definition of a "rail carrier" not to reach two categories of common carriers: (1) an entity "that merely arranges" for goods to be transported by sea and then transferred to a railroad for inland transport, but never itself actually

moves the goods; and (2) a common carrier, such as an ocean carrier, that does not conduct rail services or "'hold out' that service to the public." *Rexroth Hydraudyne B.V. v. Ocean World Lines, Inc.*, 547 F.3d 351, 362, 364 (2d Cir.2008). K-line and KAM urge us to follow *Rexroth* and exempt them as well. We do not read *Rexroth* so broadly, and in any event decline to apply its limitation of Carmack to the intermodal transport arrangement here.

In *Rexroth*, the plaintiff shippers contracted with a non-vessel-operating common carrier ("NVOCC") that acted as a middleman, arranging for ocean and inland rail carriage "from receipt to delivery." *Id.* at 356. As the term implies, the NVOCC provided no services on any vessel it owned nor did it otherwise physically handle the shipment itself. *See id.* at 361-62. Instead the NVOCC subcontracted with "an ocean carrier that provide[d] the ocean passage," who in turn subcontracted through its American agent to "arrange[ ] rail carriage for the inland leg." *Id.* at 356. Nearly all the Second Circuit's reasoning addressed this middleman, emphasizing that an entity without "any contact with the shipped goods or any performance in the carrying of those goods" merely arranges for railroad transportation and therefore does not *provide* transportation as required for Carmack liability. *Id.* at 361-62. Even if we were to accept this reasoning, it would not apply to K-line's arrangement because there was no middleman between K-line and Plaintiffs. Rather, Plaintiffs dealt directly with K-line, who actually transported the cargo on its ocean liner and had sustained contact with the shipped goods.

Rexroth also summarily excluded the ocean carrier defendant whose services were most analogous to those K-line provided here, saying that the ocean carrier did "not own or operate rail lines or other

equipment *used in connection with a railroad.*" *Id.* at 363 (emphasis added). The Second Circuit did not address the statutory definition of railroad transportation we have discussed above, but instead simply concluded without factual explanation that the ocean carrier neither conducted nor held itself out as conducting railroad transportation. *See id.* at 364. Thus we do not know the nature or substance of the ocean carrier's direct interactions, if any, with the shipper. We do know that here, K-line held itself out to the public and contracted with Plaintiffs to transport their goods all the way from China to their inland destinations—by sea utilizing K-line's vessel and by rail utilizing UPRR. In so doing, K-line and its agent, KAM, engaged in railroad transportation subject to the Board's jurisdiction by providing Plaintiffs with continuous carriage by water and rail, utilizing intermodal equipment in connection with a railroad. *See* 49 U.S.C. §§ 10102(6)(A), 10501(a)(1)(B).

In sum, we do not read *Rexroth* to categorically exclude ocean carriers from Carmack liability. The plain language of the statute and a careful application of the Second Circuit's reasoning support our conclusion that K-line and KAM provided railroad transportation covered by Carmack.[7] We therefore

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[7] The Second Circuit also seemed to suggest that because ocean carriers fall under the jurisdiction of the Federal Maritime Commission ("FMC"), they cannot also be regulated by the Board. *See Rexroth*, 547 F.3d at 357. The FMC has jurisdiction to "regulate ocean shipping lines operating between the United States and foreign countries," "monitor [ ] agreements between ocean common carriers" and "enforc[e] a number of prohibitions against discriminatory and unreasonable rates and practices." *Transpacific Westbound Rate Agreement v. Fed. Maritime Comm'n*, 951 F.2d 950, 951 (9th Cir.1991). Nothing in the FMC's

hold that Carmack applies to ocean carriers and their agents under the circumstances here.

B.

Defendants jointly argue that Carmack cannot apply to a shipment from a foreign country into the United States under a through bill of lading, and therefore the parties' contractual extension of COGSA, with its more liberal rules regarding venue, should control here. In support of their argument, Defendants highlight that four circuits have held that "the Carmack Amendment does not apply to a shipment from a foreign country to the United States (including an ocean leg and overland leg to the final destination in the United States) *unless the domestic, overland leg is covered by a separate bill of lading.*" *Altadis USA, Inc. ex. rel. Fireman's Fund Ins. Co. v. Star Line, LLC*, 458 F.3d 1288, 1291 (11th Cir.2006) (emphasis added); *see Am. Road Serv. Co. v. Consol. Rail Corp.*, 348 F.3d 565, 569 (6th Cir.2003); *Shao v. Link Cargo (Taiwan) Ltd.*, 986 F.2d 700, 703 (4th Cir.1993); *Capitol Converting Equip., Inc. v. LEP Transp., Inc.*, 965 F.2d 391, 394 (7th Cir.1992); *but see Sompo I*, 456 F.3d at 57, 60-69 (holding that Carmack applies to the domestic rail portion of a continuous intermodal shipment originating in a foreign country even where the transport was under a single through bill of lading that incorporated COGSA beyond the tackle-to-tackle phase). Despite this weight of authority, our own precedent expressly forecloses Defendants' argument in this circuit. In *Neptune Orient Lines, Ltd. v. Burlington N. & Santa Fe Ry. Co.*, 213 F.3d 1118, 1119 (9th Cir.2000), we held that "the language of [Carmack] also encompasses the inland leg of an overseas

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jurisdictional statute makes its jurisdiction exclusive. *See* 46 U.S.C. § 40301.

shipment conducted under a single 'through' bill of lading ...." *See Nippon Yusen Kaisha v. Burlington & N. Santa Fe Ry. Co.*, 367 F.Supp.2d 1292, 1298 n.4 (C.D.Cal.2005); *Chubb Group of Ins. Cos. v. H.A. Transp. Sys., Inc.*, 243 F.Supp.2d 1064, 1068 n. 3 (C.D.Cal.2002).[8]

Contrary holdings in the Fourth, Sixth, Seventh and Eleventh Circuits rest on the notion that the Board lacks jurisdiction over intermodal shipments into the United States from a point in a foreign country under a through bill of lading. *See, e.g., Am. Road Serv. Co.*, 348 F.3d at 568 ("The [Board]'s jurisdiction does not extend to a shipment under a through bill of lading unless a domestic segment of the shipment is covered by a separate domestic bill of lading."). The Second Circuit has disagreed, holding that a plain reading of the Board's jurisdictional statute applies Carmack to any rail transportation in the United States, even if it originated in a foreign country under a through bill of lading. *See Sompo I*, 456 F.3d at 64. As we noted above, Carmack's reach is coextensive with the Board's jurisdiction, *see* 49 U.S.C. § 11706(a); therefore our conclusions regarding the extent of the Board's jurisdiction, expressed in *Neptune*, determine Carmack's reach as well. Crucially, *Neptune* interpreted our precedent and Carmack's language to apply to "shipments to or from overseas ports" without any requirement for a separate domestic bill of lading for the inland carriage. *Neptune*, 213 F.3d at 1119

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[8] Although some district courts within the Ninth Circuit have held that the Carmack Amendment did not apply when the cargo at issue was shipped pursuant to a single through bill of lading, these opinions predate *Neptune*. *See, e.g., Tokio Marine & Fire Ins. Co., Ltd. v. Kaisha*, 25 F.Supp.2d 1071, 1081 (C.D.Cal.1997).

(citing *F.J. McCarty Co. v. S. Pac. Co.*, 428 F.2d 690, 692 (9th Cir.1970)).

Defendants' attempt to relegate *Neptune*'s interpretation of Carmack to the status of dictum is unavailing. There is no indication that *Neptune*" did not make a deliberate decision to adopt the rule of law it announced." *United States v. Johnson*, 256 F.3d 895, 915 (9th Cir.2001). Consequently, the absence of a separate bill of lading does not remove this shipment from Carmack's venue restrictions.

C.

Defendants next argue that even if the Carmack Amendment *could* apply to the inland leg of an international transport conducted under a single through bill of lading, here the parties' explicit contractual extension of COGSA inland should take precedence. Given COGSA's statutory language, *Neptune*'s holding is fatal to this argument. *Neptune*'s import becomes clear when analyzed in light of the distinctions and interactions between three sections of COGSA, currently codified at 46 U.S.C. § 30701 Notes Sec. 7, 12 & 13.[9] In relevant part, the text of these sections is as follows:

- **Section 7:** Nothing contained in this chapter [this note] shall prevent a carrier or a shipper from entering into any agreement, stipulation, condition, reservation, or exemption as to the responsibility and liability of the carrier or the ship for the loss or damage to or in connection with the custody and care and handling of goods prior to the loading on and subsequent to the discharge from the ship on which the goods

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[9] Previously 46 U.S.C. app. §§ 1307, 1311 and 1312, respectively.

are carried by sea. 46 U.S.C. § 30701 Notes Sec. 7.

- **Section 12:** Nothing in this chapter [this note] shall be construed as superseding any part of [the Harter Act], *or of any other law which would be applicable in the absence of this chapter* [this note], insofar as they relate to the duties, responsibilities, and liabilities of the ship or carrier prior to the time when the goods are loaded on or after the time they are discharged from the ship. 46 U.S.C. § 30701 Notes Sec. 12 (emphasis added).
- **Section 13:** This chapter [this note] shall apply to all contract for carriage of goods by sea to or from ports of the United States in foreign trade .... The term 'foreign trade' means the transportation of goods between the ports of the United States and ports of foreign countries. Nothing in this chapter [this note] shall be held to apply to contracts for carriage of goods by sea between any port of the United States or its possessions, and any other port of the United States or its possession: *Provided, however,* That any bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea between such ports, containing an express statement that it shall be subject to the provisions of this chapter [this note], shall be subjected hereto as fully as if subject hereto by the express provisions of this chapter [this note]. 46 U.S.C. § 30701 Notes Sec. 13.

Reading these three sections together reveals two interrelated reasons why the contractual extension of

COGSA to the inland leg of an intermodal, international transport cannot supersede the requirements imposed by Carmack.

First, although Section 7 "confirms that nothing *in COGSA* constrains the parties" from contractually extending COGSA's protections beyond the tackle-to-tackle period, it "leav[es] open the possibility that *something else* might constrain them." Michael F. Sturley, *Freedom of Contract and the Ironic Story of Section 7 of the Carriage of Goods by Sea Act*, 4 BENEDICT'S MARITIME BULL. 201, 203 (Third/Fourth Quarter 2006) (emphasis added) [hereinafter *Freedom of Contract*]. Section 12 "completes the story that Section 7 merely begins," by explicitly confirming that this contractual autonomy is constrained by the presence of any other law that would govern the parties before loading or after discharge. *Id.* at 203. In light of *Neptune*, the Carmack Amendment is just such an "other law" to which Section 12 mandates that the contractual inland extension of COGSA must yield. *See Sompo I*, 456 F.3d at 72-73 (relying in part on Section 12 to "hold that the contractual provision extending COGSA's terms inland must yield to Carmack").[10]

Second, Section 13's language has an important negative implication for our interpretation of the legal force of a contractual extension of COGSA under Section 7. *See id.* at 70. Through Section 13, "Congress

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[10] The congressional debates about COGSA reflect a similar understanding. As Senator White explained, "[t]he legislation supersedes the so called 'Harter Act' from the time the goods are loaded on the ship to the time they are discharged from the ship. *Otherwise our law remains precisely as it is, unaffected and unimpaired by the proposed legislation.*" 1 THE LEGISLATIVE HISTORY OF THE CARRIAGE OF GOODS BY SEA ACT AND THE *TRAVAUX PRÉPARATOIRES* OF THE HAGUE RULES 589 (Michael F. Sturley ed.1990) (emphasis added).

explicitly provided that contracts extending [COGSA's] reach in ways other than over land—in particular, contractual extensions covering trade between United States ports (or 'coastwide trade')—do have statutory force" and can "supersede prevailing federal statutes." *Id.* at 69-70.[11] Congress did not include any comparable language with respect to a contractual extension of COGSA to inland transport under Section 7, simply stating that nothing within COGSA prevents parties from doing so. " '[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Camacho v. Bridgeport Fin. Inc.*, 430 F.3d 1078, 1081 (9th Cir.2005) (quoting *Russello v. United States*, 464 U.S. 16, 23, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983)). "Therefore, that Congress, in enacting [Section 7], omitted language similar to the language in [Section 13] is persuasive evidence that Congress did not wish for period of responsibility clauses [adopted under Section 7] to have the force of statute with the capability to supersede federal law." *Sompo I*, 456 F.3d at 71; *see Freedom of Contract* at 204 (noting this textual distinction "is compelling evidence that indirectly confirms what Section 12 says directly—that Section 7 was not intended to permit a private contract to override otherwise applicable law").[12]

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[11] In the absence of such an extension, another federal statute, the Harter Act, applies to shipments between domestic ports. *See Sompo I*, 456 F.3d at 69 n. 15.

[12] The Second Circuit recently reaffirmed this core holding of *Sompo I*. *See Rexroth*, 547 F.3d at 355 ("It is clear from *Sompo* that a 'contractual provision extending COGSA's terms inland

Read together, these provisions make clear that "contracts extending COGSA beyond the tackles must give way to conflicting law." *Sompo I*, 456 F.3d at 71.[13]

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must yield to Carmack' if Carmack is applicable.") (quoting *Sompo I*, 456 F.3d at 73).

[13] We briefly distinguish earlier decisions containing general statements that the contractual extension of COGSA could supersede other statutes. *See Starrag v. Maersk, Inc.*, 486 F.3d 607, 615 (9th Cir.2007); *Sea-Land Serv., Inc. v. Lozen Int'l, L.L.C.*, 285 F.3d 808, 817 (9th Cir.2002); *N. River Ins. Co. v. Fed Sea/Fed Pac Line*, 647 F.2d 985, 987 (9th Cir.1981). First, none of these cases addressed a potential conflict between COGSA and Carmack. Second, the original source for all of these statements is *Pan Am. World Airways, Inc. v. Cal. Stevedore & Ballast Co.*, 559 F.2d 1173 (9th Cir.1977). *See N. River*, 647 F.2d at 987 (citing *Pan Am.*); *Sea-Land*, 285 F.3d at 817 (citing *N. River*); *Starrag*, 486 F.3d at 615 (citing *Sea-Land*). Importantly, *Pan American* addressed "a contract for carriage between a port in the continental United States and a port in a United States possession." 559 F.2d at 1175 n. 3. In other words, *Pan American* dealt with an extension of COGSA to coastwide trade, and therefore triggered Section 13's explicit mandate that such extensions should apply "as fully as if subject [thereto] by the express provisions of [COGSA]." *Id.* (quoting 46 U.S.C. § 1312). Its holding therefore has no bearing on the legal weight that should be afforded to inland contractual extensions of COGSA under Section 7. *See N. River*, 647 F.2d at 988-89 (noting this distinction). Finally, none of these opinions ultimately relied on its statements that the contractual extension of COGSA could supersede a federal statute in order to reach its holding. *See Starrag*, 486 F.3d at 615 (noting that "where the parties contractually extend the COGSA to cover the damage, the Harter Act does not apply," but ultimately concluding that "even if the Harter Act applied," it would not prohibit the challenged limited liability clause); *Sea-Land*, 285 F.3d at 817 (noting that "because COGSA is incorporated by contract into Sea-Land's bills of lading, 'it, rather than the Harter Act, controls,'" but only after it had already concluded that the Harter Act did not apply to the case at bar in the first place); *N. River*, 647 F.2d at 987, 989 (noting that

Per *Neptune*, Carmack is a conflicting law here. Although, as we have discussed, the Eleventh Circuit has allowed the contractual extension of COGSA inland, that court disagrees with ours about the reach of Carmack where the parties have used a through bill of lading. *Compare Neptune*, 213 F.3d at 1119 ("The language of [Carmack] also encompasses the inland leg of an overseas shipment conducted under a single 'through' bill of lading ....") *with Altadis*, 458 F.3d at 1291 ("The case law has established that the Carmack Amendment does not apply to a shipment from a foreign country to the United States ... unless the domestic, overland leg is covered by a separate bill of lading."). Because here Carmack is federal law conflicting with the parties' contractual extension of COGSA, we cannot follow the Eleventh Circuit by validating COGSA's inland reach.

Defendants argue that policy considerations of contractual autonomy, efficiency and uniformity of maritime liability rules weigh in favor of allowing shippers and carriers to extend COGSA inland. The Supreme Court recently endorsed these policy objectives by emphasizing that "[c]onfusion and inefficiency will inevitably result if more than one body of law governs a given contract's meaning." *Kirby*, 543 U.S. at 29, 125 S.Ct. 385. The unanimous Court in *Kirby* further observed that an inability to extend

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"[w]hen COGSA is incorporated by contract, it, rather than the Harter Act, controls" within the context of a case that ultimately turned on the interaction between the contractual extension of COGSA and another *contractual* term). "[W]e are not bound by a holding ... 'where it is merely a prelude to another legal issue that commands the panel's full attention ....' " *U.S. ex rel. A.O. v. Los Gatos-Saratoga Joint Union High Sch. Dist.*, 484 F.3d 1230, 1232 n. 1 (9th Cir.2007) (quoting *United States v. Johnson*, 256 F.3d 895, 915 (9th Cir.2001)).

COGSA's default rules to inland transport, so that entire shipments could be governed by the same liability regime, would defeat "the apparent purpose of COGSA[ ] to facilitate efficient contracting in contracts for carriage by sea." *Id.*; *see Royal Ins. Co. of Am. v. Orient Overseas Container Line Ltd.*, 525 F.3d 409, 419 (6th Cir.2008) ("*Kirby*'s reasoning affirms the broader principle that courts should evaluate maritime contracts in their entirety rather than treating each of the multiple stages in multimodal transportation as subject to separate legal regimes, which would be an obstacle to uniform and efficient liability rules."). Ignoring a contractual provision incorporating COGSA seems particularly inappropriate where, as here, "the parties to the bill of lading were sophisticated business entities that should rarely be released from contractual obligations." Raymond T. Waid, Comment, *Piloting in Post-*Kirby *Waters: Navigating the Circuit Split Over Whether the Carmack Amendment Applies to the Land Leg of an Intermodal Carriage of Goods on a Through Bill of Lading*, 34 TRANSP. L.J. 113, 143 (Summer 2007).

Nonetheless, and mindful of these policy considerations, *Kirby* does not control here. There, the Court held that *state* law did not apply to a bill of lading that extended COGSA inland, where COGSA and the state law conflicted. *Kirby*, 543 U.S. at 28-29, 125 S.Ct. 385. Focusing as it did on the need for state law to yield to federal law in the maritime context, the Court did not have occasion to consider which of two conflicting federal laws should govern a maritime shipment with an inland leg. *See Sompo I*, 456 F.3d at 75 ("We cannot interpret the *Kirby* Court's language concerning the policy underlying COGSA ... as implying that a contract extending COGSA inland should supersede an otherwise applicable *federal* law.")

(emphasis in original). The policy of uniformity in maritime shipping law, however compelling, must give way to controlling statutes and precedent. Given *Neptune*'s holding that Carmack applies and the conspicuous absence in COGSA of language allowing parties to give superseding statutory force to their contractual extensions of COGSA inland under Section 7, we hold that a mere contractual extension of COGSA is not sufficient by itself to overcome Carmack.

Nevertheless, Carmack—including its restrictive venue provisions—is merely a set of default rules. To the extent Carmack sanctions alternative provisions, a properly adopted alternative forum selection clause would eliminate Carmack as a conflicting "other law" superseding the parties' contractual extension of COGSA. *Neptune* did not reach this issue and does not hold otherwise. As explained above, COGSA's Section 7 cannot give such contracts statutory force. But Carmack itself does contain two provisions for avoiding the statutory defaults: 49 U.S.C. §§ 10502 & 10709. We next turn to these two possible Carmack opt-outs.

III. Contracting for Alternative Terms under Carmack

As discussed, whereas COGSA would allow a reasonable alternative forum selection clause, Carmack strictly limits the venues in which a party may bring a claim. *See* 49 U.S.C. § 11706(d)(2)(A). In this case, Tokyo does not fit into any of the categories to qualify as an acceptable forum under Carmack. *See Regal-Beloit*, 462 F.Supp.2d at 1103.[14] Accordingly, the Tokyo forum selection clause's enforceability turns on

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[14] We agree with the district court's conclusion that "[i]f applicable, the Carmack Amendment would limit venue in this case to California, Oklahoma, or Wisconsin." *Regal-Beloit*, 462 F.Supp.2d at 1103.

whether the parties complied with the applicable requirements for opting out of Carmack.

Congress created two different mechanisms—§ 10502 and § 10709—by which some rail services may be exempted from certain requirements usually imposed by Carmack. These dual provisions require us to resolve whether the parties entered into a § 10502 or a § 10709 contract and, relatedly, what each provision requires for avoiding Carmack. We conclude that § 10502 is the only proviso the parties here could have followed to contract out of Carmack's venue restrictions. Because the district court instead analyzed the contracts under § 10709, we remand for an application of § 10502, the requirements of which we clarify below.

A.

Once again, we preface our analysis by looking to the relevant statutory language. Section 10502(f) authorizes the Board to exempt from Carmack "transportation that is provided by a rail carrier as part of a continuous intermodal movement." Here, "rail carrier" is subject to the same "Definitions" section we applied above to conclude that even an ocean carrier like K-line is a rail carrier when contracting to provide inland rail transportation. *See* 49 U.S.C. § 10102 (providing definitions for "this part").[15] Thus, K-line is a rail carrier for purposes of determining whether it provides transportation that is exempt under the Board's § 10502 authority. It is undisputed that the Board has exempted the transportation at issue here. *See* 49 C.F.R. § 1090.2 ("[R]ail TOFC/COFC service and highway

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[15] Specifically, " '[t]his part' refers to 49 U.S.C. Subtitle IV, Part A, which includes Carmack." *Sompo II*, 540 F.Supp.2d at 494.

TOFC/COFC service provided by a rail carrier either itself or jointly with a motor carrier as part of a continuous intermodal freight movement is exempt from the requirements of 49 U.S.C. subtitle IV....").[16]

The Board's action relieves carriers providing such *exempt* transportation from certain regulatory burdens, such as rate regulation. *See, e.g.*, 49 U.S.C. § 10701. Carmack's liability and venue rules are not so plainly waived, however. The statute mandates that "[n]o exemption order issued pursuant to this section shall operate to relieve any rail carrier from an obligation to provide contractual terms for liability and claims which are consistent with the provisions of section 11706 of this title." 49 U.S.C. § 10502(e). Nonetheless, § 10502(e) also provides that carriers and shippers thus exempted are not unalterably bound by the liability and venue restrictions in Carmack's § 11706, because "[n]othing in this subsection or section 11706 of this title shall prevent rail carriers from offering alternative terms ...." *Id.* These two clauses of § 10502(e) are not inconsistent: carriers providing exempt transportation are obliged to provide terms consistent with Carmack's venue and liability protections to their shipper customers, but are ultimately free to contract for terms different from those in § 11706. Courts have concluded that the "combined effect" of § 10502 and § 11706 is to permit carriers providing exempt transportation to contract for terms that are different from Carmack's defaults so long as they first offer the shipper the option of full Carmack protections, presumably at a higher rate. *See Sompo I*, 456 F.3d at 60 (collecting authority). If the

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[16] These acronyms respectively refer to "trailer on flatcar" and "container on flatcar" service.

carrier fails to make this initial offer, however, "then the shipper may sue the carrier under Carmack." *Id.*[17]

On the other hand, avoiding Carmack's default rules under § 10709 is simpler: "[o]ne or more rail carriers providing transportation *subject to the jurisdiction of the Board* ... may enter into a contract with one or more purchasers of rail services to provide specified services under specified rates and conditions." 49 U.S.C. § 10709(a) (emphasis added). Under such an agreement for *nonexempt* transportation, carriers "have no duty in connection with services provided under such contract other than those duties specified by the terms of the contract." 49 U.S.C. § 10709(b). Moreover, "[a] contract that is authorized by this section, and transportation under such contract, shall not be subject to *this part*, and may not be subsequently challenged before the Board or in any court on the grounds that such contract violates a provision of this part,"49 U.S.C. § 10709(c)(1) (emphasis added)—"this part" encompassing the Carmack Amendment.

The terms of these two different provisions evidence a clear distinction between § 10502 contracts and § 10709 contracts. The distinction is based on whether the transportation at issue in the contract is exempt from Board regulation. Whereas § 10502 requires carriers providing *exempt* transportation to offer Carmack protections before they can successfully contract for alternative terms, § 10709 contains no such language—indeed, it explicitly contemplates that *nonexempt* carriers' contracts alone control. Defendants argued successfully before the district court that they entered into a § 10709 contract with

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[17] The Second Circuit's recent limitation of *Sompo I* in *Rexroth*, 547 F.3d at 360 n. 15, discussed *Sompo I*'s interpretation of § 10502 with approval.

Plaintiffs, and thus were not required to offer Carmack protections as a prerequisite for their extension of COGSA to the inland segment of the transport. Defendants point to the MITA, which was incorporated by the ERTA and explicitly states "[t]his MITA and any agreements, price documents or contracts that reference this MITA have been made under 49 U.S.C. § 10709." Plaintiffs argue on appeal that Defendants could not have entered into even a legitimate § 10709 contract without first offering full Carmack protections.[18] We disagree with both parties' reasoning. Plaintiffs are incorrect that § 10709 requires offering Carmack protections. *See Sompo II*, 540 F.Supp.2d at 494 (collecting district court cases); *but see id.* at 495-98 (discussing cases that "have varied wildly" on this issue). In any event, Defendants are mistaken that simply asserting in a contract that it was made under § 10709 makes it so. The contract here had to be a § 10502 contract because it concerned *exempt*

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[18] Although Plaintiffs did not explicitly raise this argument in their opposition to the motion to dismiss, we exercise our discretion to address it here. *See Self-Realization Fellowship Church v. Ananda Church of Self-Realization*, 59 F.3d 902, 912 (9th Cir.1995). Plaintiffs had no reason to address the potential inapplicability of § 10709 below because this was not raised by Defendants in their motions to dismiss, which instead were limited to the assertion that COGSA, rather than Carmack, should govern. Defendants only added that they were exempt from the Carmack's requirements under § 10709 in their reply briefs. It is unreasonable to require Plaintiffs to argue that a particular provision did not apply before Defendants even suggested that this provision authorized their contracts. Reaching the argument is appropriate because this issue presents a purely legal question, *see id.*, and Defendants will not be prejudiced, as they have fully briefed this issue on the merits, *see United States v. Fonseca-Caro*, 114 F.3d 906, 907 n. 2 (9th Cir.1997) (per curiam).

transportation, and must therefore be analyzed on remand under the requirements of that section.

B.

The parties' confusion is understandable given the "muddled state of the law." *Sompo II*, 540 F.Supp.2d at 498 & n. 8 (citing "[s]everal courts [that] have noted that this issue has not been adequately addressed"). Congress has not provided any guidance regarding how to read § 10502 and § 10709 in tandem, and very few courts have squarely confronted the question.[19]

We cannot adopt either of the parties' arguments, however, as each would render one of the statutory provisions practically meaningless. Plaintiffs' argument that a carrier can form a § 10709 contract only if it first offers the shipper full Carmack protections essentially converts all § 10709 contracts into § 10502 contracts. *Cf. Sompo II*, 540 F.Supp.2d at 494 ("Most courts have concluded that [the statutory] language indicates that § 10709 contracts are not subject to Carmack, and need not offer a full Carmack liability option before properly limiting carrier liability."). Defendants' argument, however, effectively nullifies § 10502 because it would allow any carrier—even those exempted under § 10502—to avoid § 10502's prerequisites simply by stating that its contract was pursuant to § 10709.[20] It would be "nonsensical for ...

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[19] The parties have therefore been forced to rely on unpublished district court decisions to support their respective arguments. *See Tamini Trasformatori S.R.L. v. Union Pac. R.R.*, No. 02 Civ. 129, 2003 WL 135722 (S.D.N.Y. Jan. 17, 2003) (supporting Plaintiffs' argument); *Tokio Marine & Fire Ins. Co. v. Mitsui O.S.K. Lines, Ltd.*, No. CV 02-3617, 2003 WL 23181013 (C.D. Cal. June 27, 2003) (supporting Defendants' argument).

[20] We are particularly troubled by the potential for such an outcome where, as here, the statement that the agreement is

§ 10502 to permit a certain category of rail contracts to offer specific rates and terms but require an initial offer of full Carmack liability and ... § 10709 to permit the *same category of rail contracts* to offer specific rates and terms with no such requirement of an initial offer of full Carmack liability." *Id.* at 499 (emphasis in original); *see also id.* ("Section 10709 simply cannot be used as a tool to extract contracts governing exempted rail carriers that operate one leg of a continuous intermodal movement from the regulatory demands of § 10502 and Carmack."). When the Board exempted the category of transportation at issue here, the providers of that transportation, including Defendants, gained the benefits of deregulated rates. The Board's exemption removed this transportation "from the requirements of 49 U.S.C. subtitle IV," 49 C.F.R. § 1090.2, which includes the provision setting standards for rates, *see* 49 U.S.C. § 10701. But Subtitle IV also includes § 10709. Consequently, carriers providing exempt transportation gain the benefits of deregulation, but lose the opportunity to contract for preferable terms under § 10709 without first offering Carmack terms.

In keeping with Congress' specification of two distinct methods for carriers to avoid the requirements imposed by Carmack, we therefore hold that a carrier providing nonexempt transportation may contract under § 10709 without offering Carmack protections, but a carrier providing exempt transportation must

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governed by § 10709 is buried within several layers of incorporated text, of which the shipper had no direct knowledge. *See Sompo II*, 540 F.Supp.2d at 500 ("First, it is not clear that the shippers ... are on actual notice of either the ITAs or the rail carrier circulars or have the opportunity to review them and, second, there are too many steps incorporated by reference to properly charge the shippers with notice of their terms.").

proceed under § 10502, which does require such an offer. *See Sompo II*, 540 F.Supp.2d at 499. Accordingly, Defendants here could not have entered into a § 10709 contract notwithstanding the MITA's clause declaring otherwise. Defendants accept that § 10502 covers exempt transportation, but argue that carriers providing exempt transportation could nevertheless still *choose* to contract under § 10709. Our interpretation of the relationship between § 10502 and § 10709 forecloses this argument. [21]

C.

In sum, § 10502 provides the only acceptable method through which these parties *might* have agreed to the Tokyo forum selection clause. To comply with § 10502, K-line needed to offer Carmack's protections when contracting with Plaintiffs. K-line argues that it did so, pointing to a clause in the MITA that reads, "[o]n domestic shipments that originate in the United States, Shippers may, at their option, select the liability provisions set forth in 49 U.S.C. § 11706." We

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[21] During oral argument, Defendants attempted to elude § 10502's requirements, asserting that: (1) § 10502 applies only to "common carrier" contracts, (2) § 10709 applies only to "private" contracts and (3) the instant contract falls into the latter category. We reject this argument. First, the argument was waived. *See United States v. Kimble*, 107 F.3d 712, 715 n. 2 (9th Cir.1997) (noting that arguments which are "not coherently developed in [the] briefs" are abandoned); *Acosta-Huerta v. Estelle*, 7 F.3d 139, 144 (9th Cir.1992) (noting that "issues raised in a brief which are not supported by argument are deemed abandoned"). Second, this argument appears to have no basis in our case law or statutes. We found no authority that distinguishes between § 10709 and § 10502 contracts in the manner Defendants suggest. Furthermore, neither § 10709 nor § 10502 uses the terms "private contract" or "common carrier contract" and neither of these phrases is included in the statute's "definitions." *See* 49 U.S.C. § 10102.

are skeptical that reference to Carmack in connection with shipments originating *in the United States*, appearing in the MITA instead of in the bills of lading, could fulfill § 10502's requirement that Carmack protections be offered. Perhaps more compellingly, K-line points to Clause 5(1) of the bills of lading, which allows K-line to subcontract with rail carriers "on any terms whatsoever." From this, it might be inferred that by making the choice to allow K-line to do all the subcontracting on "any terms whatsoever," Plaintiffs implicitly considered and rejected Carmack terms. Plaintiffs counter that no evidence of an offer of these terms exists and that another part of the MITA seems to preclude Carmack from applying.[22]

It is improper for us, on this record, to decide in the first instance whether the parties' negotiation and

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[22] The parties' disagreement about what was offered in the bills of lading by way of the later provisions of the MITA is unsurprising because the interactions among the bills of lading, the MITA and ERTA are far from clear. Although the MITA states that "all Shipments are subject to this MITA" regardless of their billing method (including a bill of lading), it also establishes that "this MITA ... as well as the terms and condition of ... ocean or rail carrier's Bills of Lading ... shall constitute the entire contract for transportation between the parties." The terms of the MITA do not make clear, then, whether the MITA's or the bills of lading's terms take precedence in the case of a conflict. This becomes increasingly complex because the ERTA never explicitly incorporated the MITA's *venue* provisions, and it is unclear whether its more general incorporation language would encompass these restrictions. Finally, the MITA establishes that changes *can* be made to its terms *if* they are "approved in writing prior to the issuance of any shipping document," or "through a document signed by a duly authorized manager of UPRR." The record does not indicate whether any such authorization occurred. This factual morass may benefit from further development before the district court on remand.

acceptance of their numerous, cross-referenced agreements included an offer of Carmack terms or an understanding that Carmack terms were available but were rejected. Section 10502(a) says only that the Carmack terms must be offered, not necessarily that they appear in the written agreement. Thus, on remand, the district court may develop the record with respect to the parties' understanding of whether Carmack terms were on the table when they executed the bills of lading.

CONCLUSION

As a matter of policy, it may be that sophisticated commercial entities should be able to freely decide by contract the liability regime that is to govern the shipment of goods from a foreign country to their ultimate destination in the United States, and do so utilizing a single bill of lading. Nonetheless, given the language of the relevant federal statutes and our own precedent, we hold that COGSA does not govern the inland transport at issue here unless the parties opted out of Carmack in accordance with the requirements of 49 U.S.C. § 10502. We further hold that § 10709 cannot apply here given the exempt status of the transportation involved. Because the district court did not consider whether the parties opted out of Carmack's default rules under § 10502, thereby clearing the way for COGSA to apply by contractual extension, we remand for that determination.

REVERSED and REMANDED.

UNITED STATES DISTRICT COURT
C.D. CALIFORNIA.

REGAL-BELOIT CORPORATION, Plaintiff,
v.

KAWASAKI KISEN KAISHA, LTD., et al.
DEFENDANT.

No. CV06-3016DSF

Nov. 13, 2006

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462 F. Supp. 2d 1098

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS PURSUANT TO THE TOKYO DISTRICT COURT FORUM SELECTION CLAUSE IN THE BILL OF LADING

FISCHER, District Judge.

I. INTRODUCTION

By this motion Defendants seek to dismiss this action pursuant to the Tokyo District Court forum selection clause in the K-Line Bills of Lading.

II. FACTS

During March and April of 2005, Defendants Kawasaki Kisen Kaisha, Ltd. ("Kawasaki") and "K" Line America, Inc. ("K-Line") accepted cargo

shipments from Plaintiffs,[1] to be carried from Shanghai, China to various delivery points within the United States via the Port of Long Beach.[2] (*See* Declaration of Jian Jia Ying ("Ying Decl.") ¶¶ 4, 8; Declaration of Thomas Kwok ("Kwok Decl.") ¶ 5; Declaration of Hua Gui Xing ("Xing Decl.") ¶ 4, 5.) The shipments were undertaken pursuant to contractual agreements between Defendants and each of the Plaintiffs, which were memorialized in Bills of Lading.

The Bills of Lading include the following relevant provisions:

> Clause 1 (Definitions & Tariff)
>
> (1)(b) "Carrier" means KAWASAKI KISEN KAISHA, LTD., Vessel, her owners, operators and charterers whether acting as carrier or bailee ...

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[1] Plaintiffs in this case are Regal-Beloit Corporation (Case No. 06-3016), a Wisconsin Corporation with its principal place of business at 200 State Street, Beloit, Wisconsin 53511 (Regal Compl. ¶ 1); Victory Fireworks, Inc. (Case No. 06-3017), a Wisconsin Corporation with its principal place of business at 579 Vincent Lane, Ellsworth, Wisconsin 54011 (Victory Compl. ¶ 1); PICC Property and Casualty Company, Ltd. (Case No. 06-3018), a foreign insurance company with its principal place of business at 2 Floor, 700 Zhongshan Road (S), Shanghai 2000010, China (PICC Compl. ¶ 1); and Royal & Sun Alliance Insurance Co., Ltd. (Case No. 06-3019), a foreign insurance company based in the United Kingdom with its principal office at 9th Floor, One Plantation Place, 30 Fenchurch Street, London, EC3M 3BD (Royal Compl. ¶ 1). Although originally filed separately, these four cases were consolidated into a single action on August 8, 2006. (Aug. 8, 2006 Stipulation Order to Consolidate.)

[2] The shipment was made pursuant to "through bills of lading" whereby the carrier and shipper contracted for transportation across the ocean and to inland destinations under a contract of carriage.

(d) "Connecting Carrier" means carriers (other than Carrier), contracted by or acting on behalf of Carrier, participating in Carriage of Goods by land, water or air under this Bill of Lading ...

(h) "Merchant" includes the shipper, consignor, consignee, owner and receiver of Goods ....

Clause 2 (Governing Law and Jurisdiction)

The contract evidenced by or contained in this Bill of Lading shall be governed by Japanese law except as may be otherwise provided for herein, and any action thereunder or in connection with Carriage of Goods shall be brought before the Tokyo District Court in Japan, to whose jurisdiction Merchant irrevocably consent [sic].

Clause 5 (Sub-Contracting: Exemptions, Immunities, Limitations, etc. of Participant(s))

(1) Carrier shall be entitled to sub-contract on any terms whatsoever Carriage, including without limitation, the loading, unloading, storing, warehousing, handling and any and all duties whatsoever undertaken by Carrier in relation to Goods by any of the following: (I) any Connecting Carrier ... (III) sub-contractors, ... agents and independent contractors ...

(2) Merchant undertakes that ... [w]ithout prejudice to the foregoing, every such vessel and Such Participant(s) shall have the benefit of all provisions herein benefitting Carrier as if such provisions were expressly for their benefit; and in entering into this contract, Carrier, to the extent of those provisions,

> does so not only on its own behalf, but also as agent and trustee of such vessel and Participant(s).

(Declaration of Alan Nakazawa ("Nakazawa Decl."), Ex. A at A-5.)

Plaintiffs and Defendant Kawasaki also entered into service contracts whereby Plaintiffs agreed to ship a minimum quantity of containers and Kawasaki agreed to transport the cargo at a specified rate. (Declaration of Dennis A. Cammarano ("Cammarano Decl."), Exs. 2-5.)

The cargo was loaded on board Kawasaki's ocean carriers in Shanghai and Hong Kong, and was carried across the Pacific Ocean to Long Beach where it was turned over to K-Line. K-Line subsequently delivered the cargo to Union Pacific Railroad Company ("UP"), with whom it had subcontracted to carry the cargo by rail to its final destination.

The contract between K-Line and UP was made pursuant to the Exempt Rail Transportation Agreement and the Master Intermodal Transportation Agreement ("MITA"). (Declaration of Sherry Johnson ("Johnson Decl."), Exs. A, B.) Section 1, Item 1.1D of MITA provides that MITA and the agreements and contracts referencing MITA are made pursuant to 49 U.S.C. § 10709. (Johnson Decl. Ex. B at B-49.)

The cargo was allegedly damaged or destroyed during a train derailment in Tyrone, Oklahoma on April 21, 2005. (Regal Compl. ¶ 9.) Plaintiffs brought suit in Los Angeles Superior Court, alleging that Defendants failed to carry, handle, monitor, and deliver the cargo so that it would be maintained in the same condition as when it was received. (Regal Compl. ¶ 9.) Defendant UP separately removed each Plaintiff's action to federal court in May of 2006.

III. LEGAL STANDARD

A motion to dismiss premised on the enforcement of a forum selection clause is treated in the same manner as a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(3). *R.A. Argueta v. Banco Mexicano S.A.*, 87 F.3d 320, 324 (9th Cir.1996). The Court is therefore permitted to "consider facts outside the pleadings." *Id.*

Interpretation and enforcement of contractual forum selection clauses are procedural issues to be decided under federal law. *Manetti-Farrow, Inc. v. Gucci Am., Inc.*, 858 F.2d 509, 513 (9th Cir.1988). Forum selection clauses are presumptively valid under federal law, and should not be set aside unless the party challenging the clause demonstrates that enforcement would be unreasonable and unjust. *See M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12, 15, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972).

A forum selection clause is "unreasonable" if (1) it was incorporated into the contract as a result of fraud, undue influence, or overweening bargaining power, *id.* at 12-13, 92 S.Ct. 1907, (2) the selected forum is so "gravely difficult and inconvenient" that the complaining party will "for all practical purposes be deprived of its day in court," *id.* at 18, 92 S.Ct. 1907, or (3) enforcement of the clause would contravene a strong public policy of the forum in which the suit is brought. *Id.* at 15, 92 S.Ct. 1907. In order to establish that a forum selection clause is unreasonable, the non-moving party has the "heavy burden of showing that trial in the chosen forum would be so difficult and inconvenient that the party would effectively be denied a meaningful day in court." *Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.*, 741 F.2d 273, 281 (9th Cir.1984) (citing *Bremen*, 407 U.S. at 18, 92 S.Ct. 1907).

IV. ANALYSIS

Kawasaki, K-Line, and UP's motion to dismiss is GRANTED because (1) the forum selection clause is *prima facie* enforceable, (2) the Carmack Amendment's venue provision does not apply, and (3) Defendants did not contractually agree to venue in New York.

A. The Forum Selection Clause in the K-Line Bill of Lading is Enforceable and Applies to Plaintiff's Claims

The Court finds none of the benchmarks necessary for invalidating a forum selection clause: (1) there is no evidence of fraud, etc.; (2) Plaintiffs would not suffer any undue inconvenience, other than the expense of litigating in Tokyo, if the forum selection clause is enforced (*see Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 535-36, 115 S.Ct. 2322, 132 L.Ed.2d 462 (1995)) (holding that increased cost and inconvenience are insufficient reasons to invalidate foreign forum selection clauses); *Fireman's Fund Ins. Co. v. M.V. DSR Atl.*, 131 F.3d 1336, 1339 (9th Cir.1997) (same); and (3) there is no public policy favoring litigation in the Central District of California. Indeed, the Supreme Court and Ninth Circuit have both held comparable clauses to be valid. *See Sky Reefer*, 515 U.S. at 540-41, 115 S.Ct. 2322 (holding that a Tokyo arbitration clause was *prima facie* valid)[3]; *Kukje Hwajae Ins. Co. v. M/V Hyundai Liberty*, 408 F.3d 1250, 1255 (9th Cir.2005) (holding that the district court abused its discretion when it failed to enforce a Korean forum selection clause). Nor have Plaintiffs argued that enforcing the forum selection clause would be

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[3] The same principles and analysis apply to both foreign arbitration clauses and foreign forum selection clauses. *Sky Reefer*, 515 U.S. at 534, 115 S.Ct. 2322; *Fireman's Fund*, 131 F.3d at 1336.

unreasonable. Plaintiffs have consequently failed to satisfy their "heavy burden of showing that trial in the chosen forum would be so difficult and inconvenient" that they "effectively [would] be denied a meaningful day in court." *Pelleport Investors, Inc.*, 741 F.2d at 281.

Additionally, the forum selection clause applies to Plaintiffs' claims. Plaintiffs are "Merchants" under the terms of the Bills of Lading and are thus subject to their terms. By alleging that the cargo was carried under the K-Line Bills of Lading and that Defendants breached the Bills of Lading when the cargo was damaged (*see* Compl. ¶¶ 7, 16), Plaintiffs accepted the terms of the Bills of Lading and became bound by them. *See All Pac. Trading Corp. v. Vessel M/V Hanjin Yosu*, 7 F.3d 1427, 1432 (9th Cir.1993). The Court therefore concludes that the Tokyo District forum selection clause in the K-Line Bills of Lading is valid and enforceable.

B. K-Line and UP are Entitled to the Benefit of the Bills of Lading Under the Himalaya Clauses[4] Contained Therein

Although the forum selection clause is included only in Kawasaki's Bills of Lading, both K-Line and UP are nevertheless entitled to its benefits. Clause 5 extends the benefits of those contracts to sub-contractors and agents. Himalaya Clauses of this type are valid and enforceable. *See, e.g., Norfolk S. Ry. Co. v. James N. Kirby, Pty Ltd.*, 543 U.S. 14, 31-32, 125 S.Ct. 385, 160 L.Ed.2d 283 (2004); *Inst. of London Underwriters v. Sea-Land Serv., Inc.*, 881 F.2d 761, 766-67 (9th

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[4] A "Himalaya Clause" is a clause in an ocean bill of lading that extends the benefit of the bill's defenses and limitations to downstream parties who have sub-contracted to perform the services contemplated by the bill. *Mori Seiki USA, Inc. v. M.V. Alligator Triumph*, 990 F.2d 444, 450 (9th Cir.1993).

Cir.1989). K-Line is Kawasaki's general agent in the United States (Johnson Decl. ¶ 5) and UP is a carrier with whom Kawasaki sub-contracted to provide overland transportation of the cargo (*see* Johnson Decl., Exs. A, B). Both K-Line and UP are consequently express beneficiaries of the K-Line Bills of Lading and therefore entitled to the benefit of the forum selection clause.

C. The Carmack Amendment Does Not Apply to Kawasaki, K-Line, or UP

Plaintiff contends that the present action is wholly governed by the Carmack Amendment, 49 U.S.C. § 11706 *et seq.*, which severely limits venue and would prohibit bringing this action before the Tokyo District Court.

The Carmack Amendment governs the liability of rail carriers for carriage by land and water under receipts and bills of lading. The statute provides that "[a] rail carrier ... shall issue a receipt or bill of lading for property it receives for transportation" and that the "rail carrier and any other carrier that delivers the property and is providing transportation ... are liable to the person entitled to recover under the receipt or bill of lading" for any "actual loss or injury to the property caused by- (1) the receiving rail carrier; (2) the delivering rail carrier; or (3) another rail carrier over whose line or route the property is transported in the United States ...."49 U.S.C. § 11706(a).

The Carmack Amendment includes a special venue requirement.

> A civil action under this section may only be brought—
>
> (i) against the originating rail carrier, in the judicial district in which the point of origin is located;

(ii) against the delivering rail carrier, in the judicial district in which the principal place of business of the person bringing the action is located if the delivering carrier operates a railroad or a route through such judicial district, or in the judicial district in which the point of destination is located; and

(iii) against the carrier alleged to have caused the loss or damage, in the judicial district in which such loss or damage is alleged to have occurred.

49 U.S.C. § 11706(d)(2)(A). Thus, the Carmack Amendment restricts venue for actions arising under § 11706.

The statutory history further supports the conclusion that Congress intended to restrict venue for actions against rail carriers. Prior to the 1980 Amendment to the Carmack Act, plaintiffs were able to bring suit against carriers in any judicial district where the carrier operated. Recognizing that this approach made "venue ... virtually uncontrollable and frequently, inconvenient," Congress amended the Act to restrict such action. *See* H.R.Rep. No. 96-1430, at 102 (1980). If applicable, the Carmack Amendment would limit venue in this case to California, Oklahoma, or Wisconsin, and render unenforceable the Tokyo District Court forum selection clause.

The Carmack Amendment's venue provision, however, does not apply to either the overseas or inland leg of the cargo shipment. The Carmack Amendment "encompasses the *inland leg* of an overseas shipment conducted under a single 'through' bill of lading," such as the one in this case "to the extent that the shipment runs beyond the dominion of the Carriage of Goods by Sea Act" ("COGSA"). 46

U.S.C. app. §§ 1300-1315. *Neptune Orient Lines, Ltd. v. Burlington N. & Santa Fe Ry. Co.*, 213 F.3d 1118, 1119 (9th Cir.2000) (emphasis added). The overseas leg of the cargo transport is thus subject to COGSA, which governs the rights and liabilities of shippers and ocean carriers and "applies to all cargo shipments which are carried by sea, to or from the United States." *Mori Seiki USA. Inc.*, 990 F.2d at 447. Under COGSA, cargo is in carriage "from the time when the goods are loaded on to the time when they are discharged from the ship." 46 U.S.C. app. § 1301(e). During this time period, COGSA applies as a matter of law. *See Hoegh Lines v. Green Truck Sales, Inc.*, 298 F.2d 240, 242 (9th Cir.1962). COGSA, unlike the Carmack Amendment, does not limit venue. The Tokyo District Court forum selection clause is therefore valid as to the overseas portion of the cargo transport.

Although the rail portion of interstate transport would typically fall under the auspices of the Carmack Amendment, the Bills of Lading here were made pursuant to 49 U.S.C. § 10709. Section 10709 is part of the Staggers Rail Act of 1980, Pub.L. No. 96-448, 94 Stat. 1895. The Act provides that "[n]othing in ... section 11706 of this title [the Carmack Amendment] shall prevent rail carriers from offering alternative terms." 49 U.S.C. § 10502(e). Courts have interpreted this provision to mean that carriers and shippers may contract out of the Carmack Amendment's provisions, either in whole or in part. *See, e.g., Co-Operative Shippers, Inc. v. Atchison, Topeka & Santa Fe Ry. Co.*, 840 F.2d 447 (7th Cir.1988); *Yamazen U.S.A., Inc. v. Chi. & Nw. Transp. Co.*, 790 F.2d 621 (7th Cir.1986); *Ferrostaal, Inc. v. Union Pac. R.R. Co.*, 109 F.Supp.2d 146 (S.D.N.Y.2000).

Section 10709 provides:

> (a) [R]ail carriers providing transportation subject to the jurisdiction of the Board under this part may enter into a contract with one or more purchasers of rail services to provide specified services under specified rates and conditions.
>
> . . .
>
> (c)(2) The exclusive remedy for any alleged breach of a contract entered into under this section shall be an action in an appropriate State court or United States district court, unless *the parties otherwise agree.*

(emphasis added). Section 10709 thus specifically contemplates that the parties to a rail service contract may contractually agree to litigate in a forum other than that provided by the Carmack Amendment. *See Dow Chem. Co. v. Union Pac. Corp.*, 8 F.Supp.2d 940, 941 (S.D.Tex.1998) ("It is clear that the purpose of § 10709 is to allow parties the ability to alter federal mandates, or to avoid federal control and oversight over rail contracts."). The parties in this case contracted to litigate all claims in the Tokyo District Court and thereby rendered inoperable the Carmack Amendment's venue provision.

4. Kawasaki and K-Line Did Not Contract for a United States Venue

Finally, the service contracts between Plaintiffs and Kawasaki do not apply to the present action. The service contracts provide that (1) the Plaintiffs agree to ship a minimum number of containers from certain points of origin to certain destinations at specified rates, and (2) Defendant Kawasaki agrees to carry any such cargo at the specified rates. (Cammarano Decl., Exs. 2-5.) In the event of any legal dispute or breach,

the service contracts provide that "[t]he substantive law of the state of New York shall govern *this Contract* and the parties submit to the jurisdiction of the U.S. District Court for the Southern District of New York."(Cammarano Decl., Ex. 2 at ¶ XII (emphasis added).) Finally, the service contracts provide that "[a]ll terms and conditions ... of Carrier's applicable Bill of Lading form ... shall apply to all shipments hereunder, notwithstanding any term of this contract." (Cammarano Decl., Ex. 2 at ¶ VIII.) By their terms, the service contracts govern only claims for breach of their pricing and shipping provisions. The service contracts do not extend to claims for cargo damage, nor do they modify the terms and conditions set forth in the Bills of Lading. The Bills of Lading are the applicable contracts of carriage governing liability for cargo damage, and the service contracts' provisions for New York jurisdiction are therefore inapplicable to the present case.

V. CONCLUSION

For the foregoing reasons, the Court GRANTS Defendants' motion to dismiss pursuant to the Tokyo District Court forum selection clause.

IT IS SO ORDERED.

Carriage of Goods by Sea Act
46 U.S.C.A. §30701 Notes

"Bills of lading subject to chapter [note]

"Every bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea to or from ports of the United States, in foreign trade, shall have effect subject to the provisions of this chapter [this note].

"Sec. 1. Definitions

"When used in this chapter [this note]—

"(a) The term 'carrier' includes the owner or the charterer who enters into a contract of carriage with a shipper.

"(b) The term 'contract of carriage' applies only to contracts of carriage covered by a bill of lading or any similar document of title, insofar as such document relates to the carriage of goods by sea, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charter party from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same.

"(c) The term 'goods' includes goods, wares, merchandise, and articles of every kind whatsoever, except live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried.

"(d) The term 'ship' means any vessel used for the carriage of goods by sea.

"(e) The term 'carriage of goods' covers the period from the time when the goods are loaded on to the time when they are discharged from the ship.

"Sec. 2. Duties and rights of carrier

"Subject to the provisions of section 1306 of this title [section 6 of this note], under every contract of carriage of goods by sea, the carrier in relation to the loading, handling, stowage, carriage, custody, care, and discharge of such goods, shall be subject to the responsibilities and liabilities and entitled to the rights and immunities set forth in sections 1303 and 1304 of this title [sections 3 and 4 of this note].

"Sec. 3. Responsibilities and liabilities of carrier and ship

"(1) Seaworthiness

"The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to—

"(a) Make the ship seaworthy;

"(b) Properly man, equip, and supply the ship;

"(c) Make the holds, refrigerating and cooling chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage, and preservation.

"(2) Cargo

"The carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.

"(3) Contents of bill

"After receiving the goods into his charge the carrier, or the master or agent of the carrier, shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things—

"(a) The leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or

coverings in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage.

"(b) Either the number of packages or pieces, or the quantity or weight, as the case may be, as furnished in writing by the shipper.

"(c) The apparent order and condition of the goods: *Provided*, That no carrier, master, or agent of the carrier, shall be bound to state or show in the bill of lading any marks, number, quantity, or weight which he has reasonable ground for suspecting not accurately to represent the goods actually received, or which he has had no reasonable means of checking.

"(4) Bill as prima facie evidence

"Such a bill of lading shall be prima facie evidence of the receipt by the carrier of the goods as therein described in accordance with paragraphs (3)(a), (b), and (c), of this section: *Provided*, That nothing in this chapter [this note] shall be construed as repealing or limiting the application of any part of chapter 801 of Title 49.

"(5) Guaranty of statements

"The shipper shall be deemed to have guaranteed to the carrier the accuracy at the time of shipment of the marks, number, quantity, and weight, as furnished by him; and the shipper shall indemnify the carrier against all loss, damages, and expenses arising or resulting from inaccuracies in such particulars. The right of the carrier to such indemnity shall in no way limit his responsibility and liability under the contract of carriage to any person other than the shipper.

"(6) Notice of loss or damage; limitation of actions

"Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at

the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, such removal shall be prima facie evidence of the delivery by the carrier of the goods as described in the bill of lading. If the loss or damage is not apparent, the notice must be given within three days of the delivery.

"Said notice of loss or damage may be endorsed upon the receipt for the goods given by the person taking delivery thereof.

"The notice in writing need not be given if the state of the goods has at the time of their receipt been the subject of joint survey or inspection.

"In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered: *Provided*, That if a notice of loss or damage, either apparent or concealed, is not given as provided for in this section, that fact shall not affect or prejudice the right of the shipper to bring suit within one year after the delivery of the goods or the date when the goods should have been delivered.

"In the case of any actual or apprehended loss or damage the carrier and the receiver shall give all reasonable facilities to each other for inspecting and tallying the goods.

"(7) 'Shipped' bill of lading

"After the goods are loaded the bill of lading to be issued by the carrier, master, or agent of the carrier to the shipper shall, if the shipper so demands, be a 'shipped' bill of lading: *Provided*, That if the shipper shall have previously taken up any document of title to such goods, he shall surrender the same as against the issue of the 'shipped' bill of lading, but at the option of

the carrier such document of title may be noted at the port of shipment by the carrier, master, or agent with the name or names of the ship or ships upon which the goods have been shipped and the date or dates of shipment, and when so noted the same shall for the purpose of this section be deemed to constitute a 'shipped' bill of lading.

"(8) Limitation of liability for negligence

"Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this chapter [this note], shall be null and void and of no effect. A benefit of insurance in favor of the carrier, or similar clause, shall be deemed to be a clause relieving the carrier from liability.

[In par. (4), "chapter 801 of title 49" substituted for "the Act of August 29, 1916, commonly known as the 'Pomerene Bills of Lading Act' [49 App. U.S.C.A. § 81 et seq.]" on authority of Pub.L. 103-272, § 6(b), July 5, 1994, 108 Stat. 1378, the first section of which enacted subtitles II, III, and V to X of Tile 49, Transportation.]

"Sec. 4. Rights and immunities of carrier and ship

"(1) Unseaworthiness

"Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped, and supplied, and to make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried fit and safe for their reception, carriage, and preservation in accordance

with the provisions of paragraph (1) of section 1303 of this title [section 3 of this note]. Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other persons claiming exemption under this section.

"(2) Uncontrollable causes of loss

"Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

"(a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship;

"(b) Fire, unless caused by the actual fault or privity of the carrier;

"(c) Perils, dangers, and accidents of the sea or other navigable waters;

"(d) Act of God;

"(e) Act of war;

"(f) Act of public enemies;

"(g) Arrest or restraint of princes, rulers, or people, or seizure under legal process;

"(h) Quarantine restrictions;

"(i) Act or omission of the shipper or owner of the goods, his agent or representative;

"(j) Strikes or lockouts or stoppage or restraint of labor from whatever cause, whether partial or general: *Provided*, That nothing herein contained shall be construed to relieve a carrier from responsibility for the carrier's own acts;

"(k) Riots and civil commotions;

"(l) Saving or attempting to save life or property at sea;

"**(m)** Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods;

"**(n)** Insufficiency of packing;

"**(o)** Insufficiency or inadequacy of marks;

"**(p)** Latent defects not discoverable by due diligence; and

"**(q)** Any other cause arising without the actual fault and privity of the carrier and without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

"(3) Freedom from negligence

"The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault, or neglect of the shipper, his agents, or his servants.

"(4) Deviations

"Any deviation in saving or attempting to save life or property at sea, or any reasonable deviation shall not be deemed to be an infringement or breach of this chapter [this note] or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom: *Provided, however*, That if the deviation is for the purpose of loading or unloading cargo or passengers it shall, prima facie, be regarded as unreasonable.

"(5) Amount of liability; valuation of cargo

"Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of

the United States, or in case of goods not shipped in packages, per customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading. This declaration, if embodied in the bill of lading, shall be prima facie evidence, but shall not be conclusive on the carrier.

"By agreement between the carrier, master, or agent of the carrier, and the shipper another maximum amount than that mentioned in this paragraph may be fixed: *Provided*, That such maximum shall not be less than the figure above named. In no event shall the carrier be liable for more than the amount of damage actually sustained.

"Neither the carrier nor the ship shall be responsible in any event for loss or damage to or in connection with the transportation of the goods if the nature or value thereof has been knowingly and fraudulently misstated by the shipper in the bill of lading.

"(6) Inflammable, explosive, or dangerous cargo

"Goods of an inflammable, explosive, or dangerous nature to the shipment whereof the carrier, master or agent of the carrier, has not consented with knowledge of their nature and character, may at any time before discharge be landed at any place or destroyed or rendered innocuous by the carrier without compensation, and the shipper of such goods shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment. If any such goods shipped with such knowledge and consent shall become a danger to the ship or cargo, they may in like manner be landed at any place, or destroyed or rendered innocuous by the

carrier without liability on the part of the carrier except to general average, if any.

"Sec. 5. Surrender of rights; increase of liabilities; charter parties; general average

"A carrier shall be at liberty to surrender in whole or in part all or any of his rights and immunities or to increase any of his responsibilities and liabilities under this chapter [this note], provided such surrender or increase shall be embodied in the bill of lading issued to the shipper.

"The provisions of this chapter [this note] shall not be applicable to charter parties; but if bills of lading are issued in the case of a ship under a charter party, they shall comply with the terms of this chapter [this note]. Nothing in this chapter [this note] shall be held to prevent the insertion in a bill of lading of any lawful provision regarding general average.

"Sec. 6. Special agreement as to particular goods

"Notwithstanding the provisions of sections 1303 to 1305 of this title [sections 3 to 5 of this note], a carrier, master or agent of the carrier, and a shipper shall, in regard to any particular goods be at liberty to enter into any agreement in any terms as to the responsibility and liability of the carrier for such goods, and as to the rights and immunities of the carrier in respect of such goods, or his obligation as to seaworthiness (so far as the stipulation regarding seaworthiness is not contrary to public policy), or the care or diligence of his servants or agents in regard to the loading, handling, stowage, carriage, custody, care, and discharge of the goods carried by sea: *Provided*, That in this case no bill of lading has been or shall be issued and that the terms agreed shall be embodied in a receipt which shall be a nonnegotiable document and shall be marked as such.

"Any agreement so entered into shall have full legal effect: *Provided*, That this section shall not apply to ordinary commercial shipments made in the ordinary course of trade but only to other shipments where the character or condition of the property to be carried or the circumstances, terms, and conditions under which the carriage is to be performed are such as reasonably to justify a special agreement.

"Sec. 7. Agreement as to liability prior to loading or after discharge

"Nothing contained in this chapter [this note] shall prevent a carrier or a shipper from entering into any agreement, stipulation, condition, reservation, or exemption as to the responsibility and liability of the carrier or the ship for the loss or damage to or in connection with the custody and care and handling of goods prior to the loading on and subsequent to the discharge from the ship on which the goods are carried by sea.

"Sec. 8. Rights and liabilities under other provisions

"The provisions of this chapter [this note] shall not affect the rights and obligations of the carrier under the provisions of the Shipping Act, 1916, or under the provisions of sections 175, 181 to 183, and 183b to 188 of this title or of any amendments thereto; or under the provisions of any other enactment for the time being in force relating to the limitation of the liability of the owners of seagoing vessels.

"Sec. 9. Discrimination between competing shippers

"Nothing contained in this chapter [this note] shall be construed as permitting a common carrier by water to discriminate between competing shippers similarly placed in time and circumstances, either (a) with respect to their right to demand and receive bills of lading subject to the provisions of this chapter [this

note]; or (b) when issuing such bills of lading, either in the surrender of any of the carrier's rights and immunities or in the increase of any of the carrier's responsibilities and liabilities pursuant to section 1305 of this title [section 5 of this note]; or (c) in any other way prohibited by the Shipping Act, 1916, as amended.

"Sec. 10. [Formerly set out as 49 App. U.S.C.A. § 25, and repealed by Sept. 18, 1940, c. 722, T. I, § 14(a), 54 Stat. 919.]

"Sec. 11. Weight of bulk cargo

"Where under the customs of any trade the weight of any bulk cargo inserted in the bill of lading is a weight ascertained or accepted by a third party other than the carrier or the shipper, and the fact that the weight is so ascertained or accepted is stated in the bill of lading, then, notwithstanding anything in this chapter [this note], the bill of lading shall not be deemed to be prima facie evidence against the carrier of the receipt of goods of the weight so inserted in the bill of lading, and the accuracy thereof at the time of shipment shall not be deemed to have been guaranteed by the shipper.

"Sec. 12. Liabilities before loading and after discharge; effect on other laws

"Nothing in this chapter [this note] shall be construed as superseding any part of sections 190 to 196 of this title, or of any other law which would be applicable in the absence of this chapter [this note], insofar as they relate to the duties, responsibilities, and liabilities of the ship or carrier prior to the time when the goods are loaded on or after the time they are discharged from the ship.

"Sec. 13. Scope of chapter [note]; 'United States'; 'foreign trade'

"This chapter [this note] shall apply to all contracts for carriage of goods by sea to or from ports of the United States in foreign trade. As used in this chapter [this note] the term 'United States' includes its districts, territories, and possessions. The term 'foreign trade' means the transportation of goods between the ports of the United States and ports of foreign countries. Nothing in this chapter [this note] shall be held to apply to contracts for carriage of goods by sea between any port of the United States or its possessions, and any other port of the United States or its possessions: *Provided, however,* That any bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea between such ports, containing an express statement that it shall be subject to the provisions of this chapter [this note], shall be subjected hereto as fully as if subject hereto by the express provisions of this chapter [this note]: *Provided further,* That every bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea from ports of the United States, in foreign trade, shall contain a statement that it shall have effect subject to the provisions of this chapter [this note].

[A proviso in second sentence that the Philippine Legislature might by law exclude its application to transportation to or from ports of the Philippine Islands was omitted in view of Proc. No. 2695, set out as a note under § 1394 of Title 22, Foreign Relations and Intercourse, which proclaimed the independence of the Philippines.]

"Sec. 14. Suspension of provisions by President

"Upon the certification of the Secretary of Transportation that the foreign commerce of the United States in its competition with that of foreign nations is prejudiced by the provisions, or any of them, of sections 1301 to 1308 of this title [sections 1 to 8 of this note], or by the laws of any foreign country or countries relating to the carriage of goods by sea, the President of the United States may, from time to time, by proclamation, suspend any or all provisions of said sections for such periods of time or indefinitely as may be designated in the proclamation. The President may at any time rescind such suspension of said sections, and any provisions thereof which may have been suspended shall thereby be reinstated and again apply to contracts thereafter made for the carriage of goods by sea. Any proclamation of suspension or rescission of any such suspension shall take effect on a date named therein, which date shall be not less than ten days from the issue of the proclamation.

"Any contract for the carriage of goods by sea, subject to the provisions of this chapter [this note], effective during any period when sections 1301 to 1308 of this title [sections 1 to 8 of this note], or any part thereof, are suspended, shall be subject to all provisions of law now or hereafter applicable to that part of said sections which may have thus been suspended.

"Sec. 15. Effective date; retroactive effect

"This chapter [this note] shall take effect ninety days after April 16, 1936; but nothing in this chapter [this note] shall apply during a period not to exceed one year following April 16, 1936, to any contract for the carriage of goods by sea, made before April 16, 1936, nor to any bill of lading or similar document of title

issued, whether before or after such date in pursuance of any such contract as aforesaid.

"Sec. 16. Short title

"This chapter [this note] may be cited as the 'Carriage of Goods by Sea Act.'"

49 U.S.C.A. §10501 (2009)

§ 10501. General jurisdiction

(a)(1) Subject to this chapter, the Board has jurisdiction over transportation by rail carrier that is—

(A) only by railroad; or

(B) by railroad and water, when the transportation is under common control, management, or arrangement for a continuous carriage or shipment.

(2) Jurisdiction under paragraph (1) applies only to transportation in the United States between a place in—

(A) a State and a place in the same or another State as part of the interstate rail network;

(B) a State and a place in a territory or possession of the United States;

(C) a territory or possession of the United States and a place in another such territory or possession;

(D) a territory or possession of the United States and another place in the same territory or possession;

(E) the United States and another place in the United States through a foreign country; or

(F) the United States and a place in a foreign country.

* * *

49 U.S.C. §10502 (2000)

§ 10502. Authority to exempt rail carrier transportation

(a) In a matter related to a rail carrier providing transportation subject to the jurisdiction of the Board under this part, the Board, to the maximum extent consistent with this part, shall exempt a person, class of persons, or a transaction or service whenever the Board finds that the application in whole or in part of a provision of this part—

(1) is not necessary to carry out the transportation policy of section 10101 of this title; and

(2) either—

(A) the transaction or service is of limited scope; or

(B) the application in whole or in part of the provision is not needed to protect shippers from the abuse of market power.

(b) The Board may, where appropriate, begin a proceeding under this section on its own initiative or on application by the Secretary of Transportation or an interested party. The Board shall, within 90 days after receipt of any such application, determine whether to begin an appropriate proceeding. If the Board decides not to begin a class exemption proceeding, the reasons for the decision shall be published in the Federal Register. Any proceeding begun as a result of an application under this subsection shall be completed within 9 months after it is begun.

(c) The Board may specify the period of time during which an exemption granted under this section is effective.

(d) The Board may revoke an exemption, to the

extent it specifies, when it finds that application in whole or in part of a provision of this part to the person, class, or transportation is necessary to carry out the transportation policy of section 10101 of this title. The Board shall, within 90 days after receipt of a request for revocation under this subsection, determine whether to begin an appropriate proceeding. If the Board decides not to begin a proceeding to revoke a class exemption, the reasons for the decision shall be published in the Federal Register. Any proceeding begun as a result of a request under this subsection shall be completed within 9 months after it is begun.

(e) No exemption order issued pursuant to this section shall operate to relieve any rail carrier from an obligation to provide contractual terms for liability and claims which are consistent with the provisions of section 11706 of this title. Nothing in this subsection or section 11706 of this title shall prevent rail carriers from offering alternative terms nor give the Board the authority to require any specific level of rates or services based upon the provisions of section 11706 of this title.

(f) The Board may exercise its authority under this section to exempt transportation that is provided by a rail carrier as part of a continuous intermodal movement.

(g) The Board may not exercise its authority under this section to relieve a rail carrier of its obligation to protect the interests of employees as required by this part.

49 U.S.C. §10709 (2000)

§ 10709. Contracts

(a) One or more rail carriers providing transportation subject to the jurisdiction of the Board under this part may enter into a contract with one or more purchasers of rail services to provide specified services under specified rates and conditions.

(b) A party to a contract entered into under this section shall have no duty in connection with services provided under such contract other than those duties specified by the terms of the contract.

(c)(1) A contract that is authorized by this section, and transportation under such contract, shall not be subject to this part, and may not be subsequently challenged before the Board or in any court on the grounds that such contract violates a provision of this part.

(2) The exclusive remedy for any alleged breach of a contract entered into under this section shall be an action in an appropriate State court or United States district court, unless the parties otherwise agree. This section does not confer original jurisdiction on the district courts of the United States based on section 1331 or 1337 of title 28, United States Code.

(d)(1) A summary of each contract for the transportation of agricultural products (including grain, as defined in section 3 of the United States Grain Standards Act (7 U.S.C. 75) and products thereof) entered into under this section shall be filed with the Board, containing such nonconfidential information as the Board prescribes. The Board shall publish special rules for such contracts in order to ensure that the

essential terms of the contract are available to the general public.

(2) Documents, papers, and records (and any copies thereof) relating to a contract described in subsection (a) shall not be subject to the mandatory disclosure requirements of section 552 of title 5.

(e) Any lawful contract between a rail carrier and one or more purchasers of rail service that was in effect on October 1, 1980, shall be considered a contract authorized by this section.

(f) A rail carrier that enters into a contract as authorized by this section remains subject to the common carrier obligation set forth in section 11101, with respect to rail transportation not provided under such a contract.

(g)(1) No later than 30 days after the date of filing of a summary of a contract under this section, the Board may, on complaint, begin a proceeding to review such contract on the grounds described in this subsection.

(2)(A) A complaint may be filed under this subsection—

(i) by a shipper on the grounds that such shipper individually will be harmed because the proposed contract unduly impairs the ability of the contracting rail carrier or carriers to meet their common carrier obligations to the complainant under section 11101 of this title; or

(ii) by a port only on the grounds that such port individually will be harmed because the proposed contract will result in unreasonable discrimination against such port.

(B) In addition to the grounds for a complaint described in subparagraph (A) of this paragraph, a

complaint may be filed by a shipper of agricultural commodities on the grounds that such shipper individually will be harmed because—

(i) the rail carrier has unreasonably discriminated by refusing to enter into a contract with such shipper for rates and services for the transportation of the same type of commodity under similar conditions to the contract at issue, and that shipper was ready, willing, and able to enter into such a contract at a time essentially contemporaneous with the period during which the contract at issue was offered; or

(ii) the proposed contract constitutes a destructive competitive practice under this part.

In making a determination under clause (ii) of this subparagraph, the Board shall consider the difference between contract rates and published single car rates.

(C) For purposes of this paragraph, the term "unreasonable discrimination" has the same meaning as such term has under section 10741 of this title.

(3)(A) Within 30 days after the date a proceeding is commenced under paragraph (1) of this subsection, or within such shorter time period after such date as the Board may establish, the Board shall determine whether the contract that is the subject of such proceeding is in violation of this section.

(B) If the Board determines, on the basis of a complaint filed under paragraph (2)(B)(i) of this subsection, that the grounds for a complaint described in such paragraph have been established with respect to a rail carrier, the Board shall, subject to the provisions of this section, order such rail carrier to provide rates and service substantially similar to the

contract at issue with such differentials in terms and conditions as are justified by the evidence.

(h)(1) Any rail carrier may, in accordance with the terms of this section, enter into contracts for the transportation of agricultural commodities (including forest products, but not including wood pulp, wood chips, pulpwood or paper) involving the utilization of carrier owned or leased equipment not in excess of 40 percent of the capacity of such carrier's owned or leased equipment by major car type (plain boxcars, covered hopper cars, gondolas and open top hoppers, coal cars, bulkhead flatcars, pulpwood rackcars, and flatbed equipment, including TOFC/COFC).

(2) The Board may, on request of a rail carrier or other party or on its own initiative, grant such relief from the limitations of paragraph (1) of this subsection as the Board considers appropriate, if it appears that additional equipment may be made available without impairing the rail carrier's ability to meet its common carrier obligations under section 11101 of this title.

(3)(A) This subsection shall cease to be effective after September 30, 1998.

(B) Before October 1, 1997, the National Grain Car Council and the Railroad-Shipper Transportation Advisory Council shall make recommendations to Congress on whether to extend the effectiveness of or otherwise modify this subsection.

49 U.S.C. §11706 (2000)

§ 11706. Liability of rail carriers under receipts and bills of lading

(a) A rail carrier providing transportation or service subject to the jurisdiction of the Board under this part shall issue a receipt or bill of lading for property it receives for transportation under this part. That rail carrier and any other carrier that delivers the property and is providing transportation or service subject to the jurisdiction of the Board under this part are liable to the person entitled to recover under the receipt or bill of lading. The liability imposed under this subsection is for the actual loss or injury to the property caused by—

(1) the receiving rail carrier;

(2) the delivering rail carrier; or

(3) another rail carrier over whose line or route the property is transported in the United States or from a place in the United States to a place in an adjacent foreign country when transported under a through bill of lading.

Failure to issue a receipt or bill of lading does not affect the liability of a rail carrier. A delivering rail carrier is deemed to be the rail carrier performing the line-haul transportation nearest the destination but does not include a rail carrier providing only a switching service at the destination.

(b) The rail carrier issuing the receipt or bill of lading under subsection (a) of this section or delivering the property for which the receipt or bill of lading was

issued is entitled to recover from the rail carrier over whose line or route the loss or injury occurred the amount required to be paid to the owners of the property, as evidenced by a receipt, judgment, or transcript, and the amount of its expenses reasonably incurred in defending a civil action brought by that person.

(c)(1) A rail carrier may not limit or be exempt from liability imposed under subsection (a) of this section except as provided in this subsection. A limitation of liability or of the amount of recovery or representation or agreement in a receipt, bill of lading, contract, or rule in violation of this section is void.

(2) A rail carrier of passengers may limit its liability under its passenger rate for loss or injury of baggage carried on trains carrying passengers.

(3) A rail carrier providing transportation or service subject to the jurisdiction of the Board under this part may establish rates for transportation of property under which—

(A) the liability of the rail carrier for such property is limited to a value established by written declaration of the shipper or by a written agreement between the shipper and the carrier; or

(B) specified amounts are deducted, pursuant to a written agreement between the shipper and the carrier, from any claim against the carrier with respect to the transportation of such property.

(d)(1) A civil action under this section may be brought in a district court of the United States or in a State court.

(2)(A) A civil action under this section may only be brought—

(i) against the originating rail carrier, in the judicial district in which the point of origin is located;

(ii) against the delivering rail carrier, in the judicial district in which the principal place of business of the person bringing the action is located if the delivering carrier operates a railroad or a route through such judicial district, or in the judicial district in which the point of destination is located; and

(iii) against the carrier alleged to have caused the loss or damage, in the judicial district in which such loss or damage is alleged to have occurred.

(B) In this section, "judicial district" means (i) in the case of a United States district court, a judicial district of the United States, and (ii) in the case of a State court, the applicable geographic area over which such court exercises jurisdiction.

(e) A rail carrier may not provide by rule, contract, or otherwise, a period of less than 9 months for filing a claim against it under this section and a period of less than 2 years for bringing a civil action against it under this section. The period for bringing a civil action is computed from the date the carrier gives a person written notice that the carrier has disallowed any part

of the claim specified in the notice. For the purposes of this subsection—

(1) an offer of compromise shall not constitute a disallowance of any part of the claim unless the carrier, in writing, informs the claimant that such part of the claim is disallowed and provides reasons for such disallowance; and

(2) communications received from a carrier's insurer shall not constitute a disallowance of any part of the claim unless the insurer, in writing, informs the claimant that such part of the claim is disallowed, provides reasons for such disallowance, and informs the claimant that the insurer is acting on behalf of the carrier.

49 U.S.C. §14706 (2000)

§ 14706. Liability of carriers under receipts and bills of lading

(a) GENERAL LIABILITY.—

(1) MOTOR CARRIERS AND FREIGHT FORWARDERS.—A carrier providing transportation or service subject to jurisdiction under subchapter I or III of chapter 135 shall issue a receipt or bill of lading for property it receives for transportation under this part. That carrier and any other carrier that delivers the property and is providing transportation or service subject to jurisdiction under subchapter I or III of chapter 135 or chapter 105 are liable to the person entitled to recover under the receipt or bill of lading. The liability imposed under this paragraph is for the actual loss or injury to the property caused by (A) the receiving carrier, (B) the delivering carrier, or (C) another carrier over whose line or route the property is transported in the United States or from a place in the United States to a place in an adjacent foreign country when transported under a through bill of lading and, except in the case of a freight forwarder, applies to property reconsigned or diverted under a tariff under section 13702. Failure to issue a receipt or bill of lading does not affect the liability of a carrier. A delivering carrier is deemed to be the carrier performing the line-haul transportation nearest the destination but does not include a carrier providing only a switching service at the destination.

(2) FREIGHT FORWARDER.—A freight forwarder is both the receiving and delivering carrier. When a freight forwarder provides service and uses a motor carrier providing transportation

subject to jurisdiction under subchapter I of chapter 135 to receive property from a consignor, the motor carrier may execute the bill of lading or shipping receipt for the freight forwarder with its consent. With the consent of the freight forwarder, a motor carrier may deliver property for a freight forwarder on the freight forwarder's bill of lading, freight bill, or shipping receipt to the consignee named in it, and receipt for the property may be made on the freight forwarder's delivery receipt.

(b) APPORTIONMENT.—The carrier issuing the receipt or bill of lading under subsection (a) of this section or delivering the property for which the receipt or bill of lading was issued is entitled to recover from the carrier over whose line or route the loss or injury occurred the amount required to be paid to the owners of the property, as evidenced by a receipt, judgment, or transcript, and the amount of its expenses reasonably incurred in defending a civil action brought by that person.

(c) SPECIAL RULES.—

(1) MOTOR CARRIERS.—

(A) SHIPPER WAIVER.—Subject to the provisions of subparagraph (B), a carrier providing transportation or service subject to jurisdiction under subchapter I or III of chapter 135 may, subject to the provisions of this chapter (including with respect to a motor carrier, the requirements of section 13710(a)), establish rates for the transportation of property (other than household goods described in section 13102(10)(A)) under which the liability of the carrier for such property is limited to a value established by written or electronic

declaration of the shipper or by written agreement between the carrier and shipper if that value would be reasonable under the circumstances surrounding the transportation.

(B) CARRIER NOTIFICATION.—If the motor carrier is not required to file its tariff with the Board, it shall provide under section 13710(a)(1) to the shipper, on request of the shipper, a written or electronic copy of the rate, classification, rules, and practices upon which any rate applicable to a shipment, or agreed to between the shipper and the carrier, is based. The copy provided by the carrier shall clearly state the dates of applicability of the rate, classification, rules, or practices.

(C) PROHIBITION AGAINST COLLECTIVE ESTABLISHMENT.—No discussion, consideration, or approval as to rules to limit liability under this subsection may be undertaken by carriers acting under an agreement approved pursuant to section 13703.

(2) WATER CARRIERS.—If loss or injury to property occurs while it is in the custody of a water carrier, the liability of that carrier is determined by its bill of lading and the law applicable to water transportation. The liability of the initial or delivering carrier is the same as the liability of the water carrier.

(d) CIVIL ACTIONS.—

(1) AGAINST DELIVERING CARRIER.—A civil action under this section may be brought against a

delivering carrier in a district court of the United States or in a State court. Trial, if the action is brought in a district court of the United States is in a judicial district, and if in a State court, is in a State through which the defendant carrier operates.

(2) AGAINST CARRIER RESPONSIBLE FOR LOSS.—A civil action under this section may be brought against the carrier alleged to have caused the loss or damage, in the judicial district in which such loss or damage is alleged to have occurred.

(3) JURISDICTION OF COURTS.—A civil action under this section may be brought in a United States district court or in a State court.

(4) JUDICIAL DISTRICT DEFINED.—In this section, "judicial district" means—

(A) in the case of a United States district court, a judicial district of the United States; and

(B) in the case of a State court, the applicable geographic area over which such court exercises jurisdiction.

(e) MINIMUM PERIOD FOR FILING CLAIMS.—

(1) IN GENERAL.—A carrier may not provide by rule, contract, or otherwise, a period of less than 9 months for filing a claim against it under this section and a period of less than 2 years for bringing a civil action against it under this section. The period for bringing a civil action is computed from the date the carrier gives a person written notice that the carrier has disallowed any part of the claim specified in the notice.

(2) SPECIAL RULES.—For the purposes of this subsection—

(A) an offer of compromise shall not constitute a disallowance of any part of the

claim unless the carrier, in writing, informs the claimant that such part of the claim is disallowed and provides reasons for such disallowance; and

(B) communications received from a carrier's insurer shall not constitute a disallowance of any part of the claim unless the insurer, in writing, informs the claimant that such part of the claim is disallowed, provides reason for such disallowance, and informs the claimant that the insurer is acting on behalf of the carrier.

(f) LIMITING LIABILITY OF HOUSEHOLD GOODS CARRIERS TO DECLARED VALUE.—A carrier or group of carriers subject to jurisdiction under subchapter I or III of chapter 135 may petition the Board to modify, eliminate, or establish rates for the transportation of household goods under which the liability of the carrier for that property is limited to a value established by written declaration of the shipper or by a written agreement.

(g) MODIFICATIONS AND REFORMS.—

(1) STUDY.—The Secretary shall conduct a study to determine whether any modifications or reforms should be made to the loss and damage provisions of this section, including those related to limitation of liability by carriers.

(2) FACTORS TO CONSIDER.—In conducting the study, the Secretary, at a minimum, shall consider—

(A) the efficient delivery of transportation services;

(B) international and intermodal harmony;

(C) the public interest; and

(D) the interest of carriers and shippers.

(3) REPORT.—Not later than 12 months after January 1, 1996, the Secretary shall submit to Congress a report on the results of the study, together with any recommendations of the Secretary (including legislative recommendations) for implementing modifications or reforms identified by the Secretary as being appropriate.

Pub. L. No. 96-448, §10713
94 Stat. 1895 (1980)

An Act
To reform the economic regulation of railroads, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

SECTION 1. This Act may be cited as the "Staggers Rail Act of 1980".

* * *

CONTRACTS

Sec. 208. (a) Subchapter I of chapter 107 of title 49, United States Code, as amended by this Act, is further amended by adding at the end thereof the following new section:

§ 10713. Contracts

"(a) One or more rail carriers providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of this title may enter into a contract with one or more purchasers of rail services to provide specified services under specified rates and conditions. Such a rail carrier may not enter into a contract with purchasers of rail service except as provided in this section.

"(b) Each contract entered into under this section shall be filed with the Commission, together with a summary of the contract containing such nonconfidential information as the Commission

prescribes. The Commission shall publish special tariff rules for such contracts in order to assure that the essential terms of the contract are available to the general public in tariff format.

"(c) A contract filed under this section shall be approved by the Commission, as provided in subsection (e) of this section, unless the Commission determines in a proceeding under subsection (d) of this section that such contract is in violation of this section.

"(d)(1) No later than 30 days after the date of filing of a contract under this section, the Commission may, on its own initiative or on complaint, begin a proceeding to review such contract on the grounds described in this subsection.

"(2)(A) In the case of a contract other than a contract for the transportation of agricultural commodities (including forest products and paper), a complaint may be filed—

"(i) by a shipper only on the grounds that such shipper individually will be harmed because the proposed contract unduly impairs the ability of the contracting carrier or carriers to meet their common carrier obligations to the complainant under section 11101 of this title; or

"(ii) by a port only on the grounds that such port individually will be harmed because the proposed contract will result in unreasonable discrimination against such port.

"(B) In the case of a contract for the transportation of agricultural commodities (including forest products and paper), in addition to the grounds for a complaint described in subparagraph (A) of this paragraph, a complaint may be filed by a shipper on the

grounds that such shipper individually will be harmed because—

"(i) the rail carrier has unreasonably discriminated by refusing to enter into a contract with such shipper for rates and services for the transportation of the same type of commodity under similar conditions to the contract at issue, and that shipper was ready, willing, and able to enter into such a contract at a time essentially contemporaneous with the period during which the contract at issue was offered; or

"(ii) the proposed contract constitutes a destructive competitive practice under this subtitle.

In making a determination under clause (ii) of this subparagraph, the Commission shall consider the difference between contract rates and published single car rates.

"(C) For purposes of this paragraph, the term 'unreasonable discrimination' has the same meaning as such term has under section 10741 of this title.

"(3)(A) Within 30 days after the date a proceeding is commenced under paragraph (1) of this subsection, or within such shorter time period after such date as the Commission may establish, the Commission shall determine whether the contract that is the subject of such proceeding is in violation of this section.

"(B) If the Commission determines, on the basis of a complaint filed under paragraph (2)(B)(i) of this subsection, that the grounds for a complaint described in such paragraph have been established with respect to a carrier, the Commission shall, subject to the provisions of this section, order such carrier to provide rates and service substantially similar to the contract

at issue with such differentials in terms and conditions as are justified by the evidence.

"(e) Approval of a contract filed under this section shall be effective—

"(1) on the date the Commission expressly approves such contract, but in no event before the end of the 30-day period beginning on the date such contract is filed or after the end of the 60-day period beginning on such date; or

"(2) if the Commission has not disapproved such contract by the end of the 60-day period beginning on the date such contract is filed, at the end of such 60-day period.

"(f) The Commission may limit the right of a rail carrier to enter into future contracts under this section following a determination that additional contracts would impair the ability of the rail carrier to fulfill its common carrier obligations under section 11101 of this title.

"(g) The Commission may not require a rail carrier to violate the terms of a contract that has been approved under this section, except to the extent necessary to comply with section 11128 of this title.

"(h) A party to a contract entered into under this section shall have no duty in connection with services provided under such contract other than those duties specified by the terms of the contract.

"(i)(1) A contract that is approved by the Commission under this section, and transportation under such contract, shall not be subject to this subtitle, and may not be subsequently challenged before the Commission or in any court on the grounds that such contract violates a provision of this subtitle.

"(2) The exclusive remedy for any alleged breach of a contract entered into under this section shall be an action in an appropriate State court or United States district court, unless the parties otherwise agree.

"(j) The provisions of this section shall not affect the status of any lawful contract between a rail carrier and one or more purchasers of rail service that is in effect on the effective date of the Staggers Rail Act of 1980. Any such contract shall hereafter have the same force and effect as if it had been entered into in accordance with the provisions of this section. Nothing in this section shall affect the rights of the parties to challenge the existence of such a contract.

"(k)(1) Any rail carrier may, in accordance with the terms of this section, enter into contracts for the transportation of agricultural commodities (including forest products and paper) involving the utilization of carrier owned or leased equipment not in excess of 40 percent of the capacity of such carrier's owned or leased equipment by major car type (plain boxcars, covered hopper cars, gondolas and open top hoppers, coal cars, bulkhead flatcars, pulpwood rackcars, and flatbed equipment, including TOFC/COFC), except that in the case of a proposed contract between a class I carrier and a shipper originating an average of 1,000 cars or more per year during the prior 3-year period by major car type on a particular carrier, not more than 40 percent of carrier owned or leased equipment utilized on the average during the prior 3- year period may be used for such contract without prior authorization by the Commission.

"(2) The Commission may, on request of a rail carrier or other party or on its own initiative, grant such relief from the limitations of paragraph (1) of this subsection as the Commission considers appropriate, if

it appears that additional equipment may be made available without impairing the rail carrier's ability to meet its common carrier obligations under section 11101 of this title.

"(l) Service under a contract approved under this section shall be deemed to be a separate and distinct class of service, and the equipment used in the fulfillment of such a contract shall not be subject to car service decisions under section 11123 of this title.

"(m) The Commission shall establish a railroad contract rate advisory service. The advisory service shall—

"(1) compile and disseminate to interested parties nonconfidential summaries of the provisions of individual contract information relating to the provisions of contracts entered into under this section with regard to various goods, items, and commodities covered by such contracts;

"(2) provide the Commission and interested parties with advice regarding contracts; and

"(3) assess the impact on competition among shippers of variations between contract rates for various shipments and the published single car rates, and submit a report on such impact to the Congress not later than 90 days after the effective date of the Staggers Rail Act of 1980.".

(b) The section analysis for chapter 107 of title 49, United States Code, is amended by inserting immediately after the item relating to section 10712, as added by this Act, the following new item:

* * *

Pub. L. No. 96-448, §10505
94 Stat. 1912 (1980)

EXEMPTION

Sec. 213. Section 10505 of title 49, United States Code, is amended to read as follows:

§ 10505. Authority to exempt rail carrier transportation

* * *

"(e) No exemption order issued pursuant to this section shall operate to relieve any rail carrier from an obligation to provide contractual terms for liability and claims which are consistent with the provisions of section 11707 of this title. Nothing in this subsection or section 11707 of this title shall prevent rail carriers from offering alternative terms nor give the Commission the authority to require any specific level of rates or services based upon the provisions of section 11707 of this title.

* * *

Pub. L. No. 95-473, §11707
92 Stat. 1453 (1978)

§ 11707. Liability of common carriers under receipts and bills of lading

(a)(1) A common carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under subchapter I, II, or IV of chapter 105 of this title shall issue a receipt or bill of lading for property it receives for transportation under this subtitle. That carrier and any other common carrier that delivers the property and is providing transportation or service subject to the jurisdiction of the Commission under subchapter I, II, or IV are liable to the person entitled to recover under the receipt or bill of lading. The liability imposed under this paragraph is for the actual loss or injury to the property caused by (1) the receiving carrier, (2) the delivering carrier, or (3) another carrier over whose line or route the property is transported in the United States or from a place in the United States to a place in an adjacent foreign country when transported under a through bill of lading and applies to property reconsigned or diverted under a tariff filed under subchapter IV of chapter 107 of this title. Failure to issue a receipt or bill of lading does not affect the liability of a carrier. A delivering carrier is deemed to be the carrier performing the line-haul transportation nearest the destination but does not include a carrier providing only a switching service at the destination.

(2) A freight forwarder is both the receiving and delivering carrier. When a freight forwarder provides service subject to this subtitle and uses a motor common carrier providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title to receive property from a

consignor, the motor common carrier may execute the bill of lading or shipping receipt for the freight forwarder with its consent. With the consent of the freight forwarder, a motor common carrier may deliver property for a freight forwarder on the freight forwarder's bill of lading, freight bill, or shipping receipt to the consignee named in it, and receipt for the property may be made on the freight forwarder's delivery receipt.

(b) The carrier issuing the receipt or bill of lading under subsection (a) of this section or delivering the property for which the receipt or bill of lading was issued is entitled to recover from the carrier over whose line or route the loss or injury occurred the amount required to be paid to the owners of the property, as evidenced by a receipt, judgment, or transcript, and the amount of its expenses reasonably incurred in defending a civil action brought by that person.

(c)(1) A common carrier may not limit or be exempt from liability imposed under subsection (a) of this section except as provided in this subsection. A limitation of liability or of the amount of recovery or representation or agreement in a receipt, bill of lading, contract, rule, or tariff filed with the Commission in violation of this section is void.

(2) If loss or injury to property occurs while it is in the custody of a water carrier, the liability of that carrier is determined by its bill of lading and the law applicable to water transportation. The liability of the initial or delivering carrier is the same as the liability of the water carrier.

(3) A common carrier of passengers may limit its liability under its passenger rate for loss or injury of baggage carried on passenger trains, boats, or motor

vehicles, or on trains, or boats, or motor vehicles carrying passengers.

(4) A common carrier may limit its liability for loss or injury of property transported under section 10730 of this title.

(d) A civil action under this section may be brought against a delivering carrier in a district court of the United States or in a State court. Trial, if the action is brought in a district court of the United States is in a judicial district, and if in a State court, is in a State, through which the defendant carrier operates a railroad or route.

(e) A carrier may not provide by rule, contract, or otherwise, a period of less than 9 months for filing a claim against it under this section and a period of less than 2 years for bringing a civil action against it under this section. The period for bringing a civil action is computed from the date that person receives written notice from the carrier that it has disallowed any part of the claim specified in the notice.

* * *

[92 Stat. 1466 (1978)]

LEGISLATIVE PURPOSE AND CONSTRUCTION

Sec. 3. (a) Sections 1 and 2 of this Act restate, without substantive change, laws enacted before May 16, 1978, that were replaced by those sections. Those sections may not be construed as making a substantive change in the laws replaced. Laws enacted after May 15, 1978, that are inconsistent with this Act are considered as superseding it to the extent of the inconsistency.

(b) A reference to a law replaced by sections 1 and 2 of this Act, including a reference in a regulation, order,

or other law, is deemed to refer to the corresponding provision enacted by this Act.

(c) An order, rule, or regulation in effect under a law replaced by sections 1 and 2 of this Act continues in effect under the corresponding provision enacted by this Act until repealed, amended, or superseded.

(d) An action taken or an offense committed under a law replaced by sections 1 and 2 of this Act is deemed to have been taken or committed under the corresponding provision enacted by this Act.

(e) An inference of a legislative construction is not to be drawn by reason of the location in the United States Code of a provision enacted by this Act or by reason of the caption or catchline thereof.

(f) If a provision enacted by this Act is held invalid, all valid provisions that are severable from the invalid provision remain in effect. If a provision of this Act is held invalid in any of its applications, the provision remains valid for all valid applications that are severable from any of the invalid applications.

Pub. L. No. 95-473, §10501
92 Stat. 1359 (1978)

An Act

To revise, codify, and enact without substantive change the Interstate Commerce Act and related laws as subtitle IV of title 49, United States Code, "Transportation".

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That certain general and permanent laws of the United States, related to transportation, are revised, codified, and enacted as title 49, United States Code, "Transportation", as follows:

TITLE 49-TRANSPORTATION

* * *

SUBCHAPTER I-RAIL, RAIL-WATER, EXPRESS, AND PIPELINE CARRIER TRANSPORTATION

§ 10501. General jurisdiction

(a) Subject to this chapter and other law, the Interstate Commerce Commission has jurisdiction over transportation—

(1) by rail carrier, express carrier, sleeping car carrier, water common carrier, and pipeline carrier that is—

(A) only by railroad;

(B) by railroad and water, when the transportation is under common control, management, or arrangement for a continuous carriage or shipment; or

(C) by pipeline or by pipeline and railroad or water when transporting a commodity other than water, gas, or oil; and

(2) to the extent the transportation is in the United States and is between a place in—

(A) a State and a place in another State;

(B) the District of Columbia and another place in the District of Columbia;

(C) a State and a place in a territory or possession of the United States;

(D) a territory or possession of the United States and a place in another such territory or possession;

(E) a territory or possession of the United States and another place in the same territory or possession;

(F) the United States and another place in the United States through a foreign country; or

(G) the United States and a place in a foreign country.

* * *

49 U.S.C. §1 (1976)

§ 1. Regulation in general; car service; alteration of line

(1) Carriers subject to regulation

The provisions of this chapter shall apply to common carriers engaged in–

(a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment; or

(b) The transportation of oil or other commodity, except water and except natural or artificial gas, by pipe line, or partly by pipe line and partly by railroad or by water—

(c) Repealed. June 19, 1934, ch. 652, title VI, § 602(b), 48 Stat. 1102.

From one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States through a foreign country to any other place in the United States, or from or to any place in the United States to or from a foreign country, but only insofar as such transportation takes place within the United States.

* * *

An Act to Regulate Commerce, ch. 3591, 34 Stat. 593 (1906)

CHAP. 3591.—An Act To amend an Act entitled "An act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven, and all Acts amendatory thereof, and to enlarge the powers of the Interstate Commerce Commission.

* * *

SEC. 7. That section twenty of said Act be amended so as to read as follows:

"SEC. 20. . . . .

"That any common carrier, railroad, or transportation company receiving property for transportation from a point in one State to a point in another State shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed: *Provided*, That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law.

"That the common carrier, railroad, or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad, or transportation company on whose line the loss, damage, or injury shall have been sustained the amount of such loss, damage, or injury as it may be required to pay to the owners of such

property, as may be evidenced by any receipt, judgment, or transcript thereof."

* * *

An Act to Regulate Commerce, ch. 176, 34 Stat. 1196 (1915)

CHAP. 176.—An Act To amend an Act entitled "An act to amend an Act entitled 'An Act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, and all Acts amendatory thereof, and to enlarge the powers of the Interstate Commerce Commission," approved June twenty-ninth, nineteen hundred and six.

Be it enacted by the Senate and House of Representatives of the Untied States of America in Congress assembled, That so much of section seven of an Act entitled "An Act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, and all Acts amendatory thereof, and to enlarge the powers of the Interstate Commerce Commission," approved June twenty-ninth, nineteen hundred and six, as reads as follows, to wit:

"That any common carrier, railroad, or transportation company receiving property for transportation from a point in one State to a point in another State shall issue a receipt or a bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered, or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed: *Provided*, That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law," be, and the same is hereby, amended so as to read as follows, to wit:

"That any common carrier, railroad, or transportation company subject to the provisions of this Act receiving property for transportation from a point in one State or Territory or the District of Columbia to a point in another State, Territory, District of Columbia, or from any point in the United States to a point in an adjacent foreign country shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, and no contract, receipt, rule, regulation, or other limitation of any character whatsoever, shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed; and any such common carrier, railroad, transportation from a point in one State, Territory, or the District of Columbia to a point in another State or Territory, or from a point in a State or Territory to a point in the District of Columbia, or from any point in the United States to a point in an adjacent foreign country, or for transportation wholly within a Territory shall be liable to the lawful holder of said receipt or bill of lading or to any party entitled to recover thereon, whether such receipt or bill of lading has been issued or not, for the full actual loss, damage, or injury to such property caused by it or by any such common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, notwithstanding any limitation of liability or limitation of the amount of recovery or

representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made is hereby declared to be unlawful and void: *Provided, however,* That if the goods are hidden from view by wrapping, boxing, or other means, and the carrier is not notified as to the character of the goods, the carrier may require the shipper to specifically state in writing the value of the goods, and the carrier shall not be liable beyond the amount so specifically stated, in which case the Interstate Commerce Commission may establish and maintain rates for transportation, dependent upon the value of the property shipped as specifically stated in writing by the shipper. Such rates shall be published as are other rate schedules: *Provided further,* That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under the existing law: *Provided further,* That it shall be unlawful for any such common carrier to provide by rule, contract, regulation, or otherwise a shorter period for giving notice of claims than ninety days and for the filing of claims for a shorter period than four months, and for the institution of suits than two years: *Provided, however,* That if the loss, damage, or injury complained of was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery."

SEC. 2. That this Act shall take effect and be in force from ninety days after its passage.

Approved, March 4, 1915.

49 U.S.C. §20 (1976)

* * *

(11) Liability of initial and delivering carrier for loss; limitation of liability; notice and filing of claim

Any common carrier, railroad, or transportation company subject to the provisions of this chapter receiving property for transportation from a point in one State or Territory or the District of Columbia to a point in another State, Territory, District of Columbia, or from any point in the United States to a point in an adjacent foreign country shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, and no contract, receipt, rule, regulation, or other limitation of any character whatsoever shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed; and any such common carrier, railroad, or transportation company so receiving property for transportation from a point in one State, Territory, or the District of Columbia to a point in another State or Territory, or from a point in a State or Territory to a point in the District of Columbia, or from any point in the United States to a point in an adjacent foreign country, or for transportation wholly within a Territory, or any common carrier, railroad, or transportation company delivering said property so received and transported shall be liable to the lawful holder of said receipt or bill of lading or to any party

entitled to recover thereon, whether such receipt or bill of lading has been issued or not, for the full actual loss, damage, or injury to such property caused by it or by any such common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made is declared to be unlawful and void: *Provided*, That if the loss, damage, or injury occurs while the property is in the custody of a carrier by water the liability of such carrier shall be determined by the bill of lading of the carrier by water and by and under the laws and regulations applicable to transportation by water, and the liability of the initial or delivering carrier shall be the same as that of such carrier by water: *Provided, however*, That the provisions hereof respecting liability for full actual loss, damage, or injury, notwithstanding any limitation of liability or recovery or representation or agreement or release as to value, and declaring any such limitation to be unlawful and void, shall not apply, first, to baggage carried on passenger trains or boats, or trains or boats carrying passengers; second, to property, except ordinary livestock, received for transportation concerning which the carrier shall have been or shall be expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in

writing as the released value of the property, in which case such declaration or agreement shall have no other effect than to limit liability and recovery to an amount not exceeding the value so declared or released, and shall not, so far as relates to values, be held to be a violation of section 10 of this title; and any tariff schedule which may be filed with the Commission pursuant to such order shall contain specific reference thereto and may establish rates varying with the value so declared and agreed upon; and the Commission is empowered to make such order in cases where rates dependent upon and varying with declared or agreed values would, in its opinion, be just and reasonable under the circumstances and conditions surrounding the transportation. The term "ordinary livestock" shall include all cattle, swine, sheep, goats, horses, and mules, except such as are chiefly valuable for breeding, racing, show purposes, or other special uses: *Provided further*, That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under the existing law: *Provided further*, That all actions brought under and by virtue of this paragraph against the delivering carrier shall be brought, and may be maintained, if in a district court of the United States, only in a district, and if in a State court, only in a State through or into which the defendant carrier operates a line of railroad: *Provided further*, That it shall be unlawful for any such receiving or delivering common carrier to provide by rule, contract, regulation, or otherwise a shorter period for the filing of claims than nine months, and for the institution of suits than two years, such period for institution of suits to be computed from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice: *And provided*

further, That for the purposes of this paragraph and of paragraph (12) of this section the delivering carrier shall be construed to be the carrier performing the line-haul service nearest to the point of destination and not a carrier performing merely a switching service at the point of destination: *And provided further*, That the liability imposed by this paragraph shall also apply in the case of property reconsigned or diverted in accordance with the applicable tariffs filed as in this chapter provided.

* * *

Interstate Commerce Act Amendment, ch. 498, 49 Stat. 543 (1935)

AN ACT

To amend the Interstate Commerce Act, as amended, by providing for the regulation of the transportation of passengers and property by motor carriers operating in interstate or foreign commerce, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Interstate Commerce Act, as amended, herein referred to as "Part I", is hereby amended by inserting at the beginning thereof the caption "part I", and by substituting for the words "this Act", wherever they occur, the words "this part", but such part I may continue to be cited as the "Interstate Commerce Act", and said Interstate Commerce Act is hereby further amended by adding the following part II:

"PART II

"SHORT TITLE

"SEC. 201. This part may be cited as the 'Motor Carrier Act, 1935'.

"DECLARATION OF POLICY AND DELEGATION OF JURISDICTION

"SEC. 202. (a) It is hereby declared to be the policy of Congress to regulate transportation by motor carriers in such manner as to recognize and preserve the inherent advantages of, and foster sound and economic conditions in, such transportation and among such carriers in the public interest; promote adequate, economical, and efficient service by motor carriers, and

reasonable charges therefor, without unjust discriminations, undue preferences or advantages, and unfair or destructive competitive practices; improve the relations between, and coordinate transportation by and regulation of, motor carriers and other carriers; develop and preserve a highway transportation system properly adapted to the needs of the commerce of the United States and of the national defense; and cooperate with the several States and the duly authorized officials thereof and with any organization of motor carriers in the administration and enforcement of this part.

"(b) The provisions of this part apply to the transportation of passengers or property by motor carriers engaged in interstate or foreign commerce and to the procurement of and the provision of facilities for such transportation, and the regulation of such transportation, and of the procurement thereof, and the provision of facilities therefor, is hereby vested in the Interstate Commerce Commission.

"(c) Nothing in this part shall be construed to affect the powers of taxation of the several States or to authorize a motor carrier to do an intrastate business on the highways of any State, or to interfere with the exclusive exercise by each State of the power of regulation of intrastate commerce by motor carriers on the highways thereof.

* * *

"RECEIPTS OR BILLS OF LADING

"SEC. 219. The provisions of section 20 (11) of part I shall apply with like force and effect to receipts or bills of lading of common carriers by motor vehicle.

* * *

49 C.F.R. §1090.2

§ 1090.2 Exemption of rail and highway TOFC/COFC service.

Except as provided in 49 U.S.C. 10505 (e) and (g), 109229(1), and 10530, rail TOFC/COFC service and highway TOFC/COFC service provided by a rail carrier either itself or jointly with a motor carrier as part of a continuous intermodal freight movement is exempt from the requirements of 49 U.S.C. subtitle IV, regardless of the type, affiliation, or ownership of the carrier performing the highway portion of the service. Motor carrier TOFC/COFC pickup and delivery services arranged independently with the shipper or receiver (or its representative/agent) and performed immediately before or after a TOFC/COFC movement provided by a rail carrier are similarly exempt. Tariffs heretofore applicable to any transportation service exempted by this section shall no longer apply to such service. The exemption does not apply to a motor carrier service in which a rail carrier participates only as the motor carrier's agent (Plan I TOFC/COFC), nor does the exemption operate to relieve any carrier of any obligation it would otherwise have, absent the exemption, with respect to providing contractual terms for liability and claims.

46 C.F.R. §520.1

§ 520.1 Scope and purpose.

(a) *Scope.* The regulations of this part govern the publication of tariffs in automated systems by common carriers and conferences in the waterborne foreign commerce of the United States. They cover the transportation of property by such carriers, including through transportation with inland carriers. They implement the tariff publication requirements of section 8 of the Shipping Act of 1984 ("Act"), as modified by the Ocean Shipping Reform Act of 1998 and section 424 of Public Law 105-258.

* * *

46 C.F.R. §520.2

§ 520. 2 Definitions.

The following definitions shall apply to this part:

Act means the Shipping Act of 1984, as amended by the Ocean Shipping Reform Act of 1998.

Amendment means any change, alteration, correction or modification of an existing tariff.

Assessorial charge means the amount that is added to the basic ocean freight rate.

BTA means the Commission's Bureau of Trade Analysis or its successor bureau.

Bulk cargo means cargo that is loaded and carried in bulk without mark or count in a loose unpackaged form, having homogeneous characteristics. Bulk cargo loaded into intermodal equipment, except LASH or Seabee barges, is subject to mark and count and is, therefore, subject to the requirements of this part.

Co-loading means the combining of cargo by two or more NVOCCs for tendering to an ocean common carrier under the name of one or more of the NVOCCs.

Combination rate means a rate for a shipment moving under intermodal transportation which is computed by the addition of a TRI, and an inland rate applicable from/to inland points not covered by the TRI.

Commission means the Federal Maritime Commission.

Commodity description means a comprehensive description of a commodity listed in a tariff, including a brief definition of the commodity.

Commodity description number means a number that may be used to identify a commodity description.

Commodity index means an index of the commodity descriptions contained in a tariff.

Commodity rate means a rate for shipping to or from specific locations a commodity or commodities specifically named or described in the tariff in which the rate or rates are published.

Common carrier means a person holding itself out to the general public to provide transportation by water of cargo between the United States and a foreign country for compensation that:

(1) Assumes responsibility for the transportation from port or point of receipt to the port or point of destination; and

(2) Utilizes, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country, except that the term does not include a common carrier engaged in ocean transportation by ferry boat, ocean tramp, or chemical parcel tanker or by a vessel when primarily engaged in the carriage of perishable agricultural commodities:

(i) If the common carrier and the owner of those commodities are wholly-owned, directly or indirectly, by a person primarily engaged in the marketing and distribution of those commodities and

(ii) Only with respect to the carriage of those commodities.

Conference means an agreement between or among two or more ocean common carriers which provides for the fixing of and adherence to uniform tariff rates, charges, practices and conditions of service relating to

the receipt, carriage, handling and/or delivery of passengers or cargo for all members, but the term does not include joint service, consortium, pooling, sailing, or transshipment agreements.

Consignee means the recipient of cargo from a shipper; the person to whom a transported commodity is to be delivered.

Container means a demountable and reusable freight-carrying unit designed to be transported by different modes of transportation and having construction, fittings, and fastenings able to withstand, without permanent distortion or additional exterior packaging or containment, the normal stresses that apply on continuous all-water and intermodal transportation. The term includes dry cargo, ventilated, insulated, refrigerated, flat rack, vehicle rack, liquid tank, and open-top containers without chassis, but does not include crates, boxes or pallets.

Controlled carrier means an ocean common carrier that is, or whose operating assets are, directly or indirectly owned or controlled by a government; ownership or control by a government shall be deemed to exist with respect to any common carrier if:

(1) A majority portion of the interest in the common carrier is owned or controlled in any manner by that government, by an agency thereof, or by any public or private person controlled in any manner by that government, by any agency thereof, or by any public or private person controlled by that government; or

(2) That government has the right to appoint or disapprove the appointment of a majority of the directors, the chief operating officer or the chief executive officer of the common carrier.

Effective date means the date upon which a published tariff or tariff element is scheduled to go into effect. Where there are multiple publications to a tariff element on the same day, the last element published with the same effective date is the one effective for that day.

Expiration date means the last day after which the entire tariff or tariff element is no longer in effect.

Foreign commerce means that commerce under the jurisdiction of the Act.

Forest products means forest products including, but not limited to, lumber in bundles, rough timber, ties, poles, piling, laminated beams, bundled siding, bundled plywood, bundled core stock or veneers, bundled particle or fiber boards, bundled hardwood, wood pulp in rolls, wood pulp in unitized bales, paper and paper board in rolls or in pallet or skid-sized sheets, liquid or granular by-products derived from pulping and papermaking, and engineered wood products.

Harmonized Code means the coding provisions of the Harmonized System.

Harmonized System means the Harmonized Tariff Schedule of the United States ("U.S. HTS"), based on the international Harmonized System, administered by the U.S. Customs Service for the U.S. International Trade Commission, and Schedule B, administered by the U.S. Census Bureau.

Inland point means any city and associated state/province, country, U.S. ZIP code, or U.S. ZIP code range, which lies beyond port terminal areas. (A city may share the name of a port: the immediate ship-side and terminal area is the port, but the rest of the city is considered an inland point.)

Inland rate means a rate specified from/to an ocean port to/from an inland point, for specified modes of overland transportation.

Inland rate table means a structured matrix of geographic inland locations (points, postal codes/postal code ranges, etc.) on one axis and transportation modes (truck, rail, etc.) on the other axis, with the inland rates specified at the matrix row and column intersections.

Intermodal transportation means continuous through transportation involving more than one mode of service (e.g., ship, rail, motor, air), for pickup and/or delivery at a point beyond the area of the port at which the vessel calls. The term "intermodal transportation" can apply to "through transportation (at through rates)" or transportation on through routes using combination rates.

Joint rates means rates or charges established by two or more common carriers for ocean transportation over the combined routes of such common carriers.

Local rates means rates or charges for transportation over the route of a single common carrier (or any one common carrier participating in a conference tariff), the application of which is not contingent upon a prior or subsequent movement.

Location group means a logical collection of geographic points, ports, states/provinces, countries, or combinations thereof, which is primarily used to identify, by location group name, a group that may represent tariff origin and/or destination scope and TRI origin and/or destination.

Loyalty contract means a contract with an ocean common carrier or agreement by which a shipper obtains lower rates by committing all or a fixed portion

of its cargo to that carrier or agreement and the contract provides for a deferred rebate arrangement.

Motor vehicle means a wheeled vehicle whose primary purpose is ordinarily the non-commercial transportation of passengers, including an automobile, pickup truck, minivan, or sport utility vehicle.

Ocean common carrier means a common carrier that operates, for all or part of its common carrier service, a vessel on the high seas or the Great Lakes between a port in the United States and a port in a foreign country, except that the term does not include a common carrier engaged in ocean transportation by ferry boat, ocean tramp, or chemical parcel-tanker.

Ocean transportation intermediary means an ocean freight forwarder or a non-vessel-operating common carrier. For purposes of this part,

(1) *Ocean freight forwarder* means a person that—

(i) In the United States, dispatches shipments from the United States via a common carrier and books or otherwise arranges space for those shipments on behalf of shippers; and

(ii) Processes the documentation or performs related activities incident to those shipments; and

(2) *Non-vessel-operating common carrier ("NVOCC")* means a common carrier that does not operate the vessels by which the ocean transportation is provided, and is a shipper in its relationship with an ocean common carrier.

Open rate means a rate on a specified commodity or commodities over which a conference relinquishes or suspends its ratemaking authority in whole or in part, thereby permitting each individual ocean common

carrier member of the conference to fix its own rate on such commodity or commodities.

Organization name means an entity's name on file with the Commission and for which the Commission assigns an organization number.

Organization record means information regarding an entity, including its name, address, and organization type.

Origin scope means a location group defining the geographic range of cargo origins covered by a tariff.

Person includes individuals, firms, partnerships, associations, companies, corporations, joint stock associations, trustees, receivers, agents, assignees and personal representatives.

Point of rest means that area on the terminal facility which is assigned for the receipt of inbound cargo from the ship and from which inbound cargo may be delivered to the consignee, and that area which is assigned for the receipt of outbound cargo from shippers for vessel loading.

Port means a place at which a common carrier originates or terminates (by transshipment or otherwise) its actual ocean carriage of cargo or passengers as to any particular transportation movement.

Project rates means rates applicable to the transportation of materials and equipment to be employed in the construction or development of a named facility used for a major governmental, charitable, manufacturing, resource exploitation and public utility or public service purpose, including disaster relief projects.

Proportional rates means rates or charges assessed by a common carrier for transportation services, the application of which is conditioned upon a prior or subsequent movement.

Publication date means the date a tariff or tariff element is published in a carrier's or conference's tariff.

Publisher means an organization authorized to publish or amend tariff information.

*Rate m*eans a price stated in a tariff for providing a specified level of transportation service for a stated cargo quantity, from origin to destination, on and after a stated effective date or within a defined time frame.

Retrieval means the process by which a person accesses a tariff via dial-up telecommunications or a network link and interacts with the carrier's or publisher's system on a transaction-by-transaction basis to retrieve published tariff matter.

Rules means the stated terms and conditions set by the tariff owner which govern the application of tariff rates, charges and other matters.

Scope means the location group(s) (geographic groupings(s)) listing the ports or ranges of ports to and from which the tariff's rates apply.

Shipment means all of the cargo carried under the terms of a single bill of lading.

Shipper means:

(1) A cargo owner;

(2) The person for whose account the ocean transportation is provided;

(3) The person to whom delivery is to be made;

(4) A shipper's association; or

(5) An NVOCC that accepts responsibility for payment of all charges applicable under the tariff or service contract.

Shippers' association means a group of shippers that consolidates or distributes freight on a nonprofit basis for the members of the group in order to secure carload, truckload, or other volume rates or service contracts.

Special permission means permission, authorized by the Commission, for certain tariff publications that do not conform with applicable regulations, usually involving effectiveness on less than statutory notice.

Tariff means a publication containing the actual rates, charges, classifications, rules, regulations and practices of a common carrier or a conference of common carriers. The term "practices" refers to those usages, customs or modes of operation which in any way affect, determine or change the transportation rates, charges or services provided by a common carrier or conference and, in the case of conferences, must be restricted to activities authorized by the basic conference agreement.

Tariff number means a unique 3-digit number assigned by the publisher to distinguish it from other tariffs. Tariffs may be identified by the 6-digit organization number plus the user-assigned tariff number (e.g., 999999-001) or a Standard Carrier Alpha Code ("SCAC") plus the user-assigned tariff number.

Tariff rate item ("TRI") means a single freight rate, in effect on and after a specific date or for a specific time period, for the transportation of a stated cargo quantity, which may move from origin to destination under a single specified set of transportation conditions, such as container size or temperature.

TRI number means a number that consists of the numeric commodity code, if any, and a unique numeric suffix used to differentiate TRIs within the same commodity description. TRI numbers are not required in systems that do not use numeric commodity coding.

Through rate means the single amount charged by a common carrier in connection with through transportation.

Through transportation means continuous transportation between points of origin and destination, either or both of which lie beyond port terminal areas, for which a through rate is assessed and which is offered or performed by one or more carriers, at least one of which is a common carrier, between a United States point or port and a foreign point or port.

Thru date means the date after which an amendment to a tariff element is designated by the publisher to be unavailable for use and the previously effective tariff element automatically goes back into effect.

Time/volume rate means a rate published in a tariff which is conditioned upon receipt of a specified aggregate volume of cargo or aggregate freight revenue over a specified period of time.

Trade name means a name used for conducting business, but which is not necessarily its legal name. This is also known as a "d/b/a" (doing business as) name.

Transshipment means the physical transfer of cargo from a vessel of one carrier to a vessel of another in the course of all-water or through transportation, where at least one of the exchanging carriers is an ocean common carrier subject to the Commission's jurisdiction.

UNION PACIFIC RAILROAD COMPANY
(UPRR)

[Union Pacific Logo]

Master Intermodal Transportation Agreement
(Formerly known as UP Exempt Circular 20-B)

* * *

SECTION 1. GENERAL RULES AND POLICIES

ITEM 1.1: GENERAL RULES

A. Definitions for any capitalized terms used in this Master Intermodal Transportation Agreement (MITA) are set forth in Appendix A hereto. Additional Intermodal Shipment definitions can be found at: http://www.uprr.com/customers/intermodal/integlos.shtml

B. The terms and conditions contained in this document apply to all Intermodal Units tendered to UPRR for transportation over its lines.

C. Where any reference is made in individual Intermodal documents, which shall include but is not limited to bills of lading, waybills, transportation agreements, letter quotes or special commodity quotes (SCQ's) to UP Exempt Circular 20-B, or Southern Pacific Lines Intermodal Circular 1000 (SP 1000), then effective with the effective date of this document, it will be understood to mean Union

Pacific Railroad Company's (UPRR) Master Intermodal Transportation Agreement (MITA).

D. This MITA and any agreements, price documents or contracts that reference this MITA have been made under 49 U.S.C. § 10709 whereby UPRR or any rail carrier party to any agreement, price document or contract referencing this MITA will provide the Beneficial Owner, Shipper or Customer, with rail transportation and other services outlined herein in exchange for the applicable prices and any charges. This MITA may not be modified by any notations made on shipping documents. Any changes to this MITA must be approved in writing prior to the issuance of any shipping document.

* * *

ITEM 3.2: CARMACK LIABILITY

49 U.S.C. Section 11706 provides for full-value liability and other liability terms for UPRR and the Shipper. In order for a Shipment to be subject to the terms of 49 U.S.C. Section 11706 it must comply with all of the following provisions:

A. Shipper must notify UPRR's Damage Prevention Department in writing to the above address, or via fax at (402) 271-5191, no less than 5 working days in advance of the Shipment being In-Gated at the Intermodal Terminal that the Shipper chooses Carmack liability protection, and

B. On Shipments that Shipper requests full-vaule (Carmack) liability protection Shipper must prepay the Carmack rate. The Carmack rate will be the Freight All Kinds (FAK) rate multiplied by 250%. This Carmack rate will

apply unless special written pricing authority is obtained by contacting its UPRR Marketing and Sales Representative or Damage Prevention Services (see Item 3.1 (E 4)). Failure by Shipper to provide a written agreement, prior to the Shipment being In-gated at the Intermodal Terminal or interchanged from a Connecting Carrier, evidencing that UPRR has agreed to provide Carmack Liability for any specified Shipment shall relieve UPRR from any obligation in excess of the liability limits set forth in Item 3.1 CARGO LOSS AND DAMAGE PROVISIONS.

C. Carmack Liability protection is not available for Shipments moving under FAK rates.

D. Carmack liability coverage is not available for any Shipments that originate outside the borders of the United States of America.

* * *

ITEM 7.7: DEFINITION OF DOMESTIC AND INTERNATIONAL SHIPMENTS

A. Specific to Domestic Shipments:

1. Domestic traffic shall be rated in accordance with prices so identified in individual contracts or pricing documents to which UPRR is a party that incorporate the terms and provisions of this MITA.
2. Domestic traffic is rail traffic that originates and/or terminates in the continental United States.

B. Specific to International Shipments:

1. International traffic is U.S. Intermodal rail traffic involving an immediate prior or subsequent ocean movement.

2. International traffic shall be rated in accordance with prices so identified in individual contracts or pricing documents to which UPRR is a party. Unless otherwise agreed, international rates given to ocean carriers apply on international traffic moving on their Ocean Bill of Lading and in their specific owned or leased Containers. Any other traffic cannot be moved under these rates.
3. Shipments, which are warehoused, processed, repackaged, etc., prior or subsequent to rail movement will not be considered international traffic and shall be rated as domestic Shipments.
4. Mixed Shipments of domestic traffic and international traffic shall be rated as domestic traffic.
5. Shipments from or to Hawaii, Puerto Rico, Alaska and Guam will be considered international traffic.
6. Customer or its Agent will perform, at Shippers expense, Intermodal Terminal ramping at origin and destinations not located on UPPR.
7. Rates do not include any charge, which may be incurred prior to Interchange on import Shipments or following Interchange on export Shipments.
8. Unless otherwise provided, rates applicable to international border crossings, inclusive of Through Rates to and from Canada and Mexico, do not include: brokerage fees, in-bond preparation; export, import or manifest declaration of messenger services. Shipper

is responsible for all ancillary and related charges for the movement of the Shipment.

9. In the event UPRR determines that domestic Shipments are being billed by Receiver or Shipper under rates applicable only on international Shipments, UPRR shall ASSESS A SURCHARGE of One Thousand dollars ($1,000.00) for each Intermodal Unit so billed. This surcharge will be assessed whether the Intermodal Unit has been shipped or is awaiting shipment by UPRR. This surcharge will be billed to the party submitting rail billing to UPRR. UPRR reserves the right to cancel any rate(s) in contracts or pricing documents on one (1) days notice for improper application by a party.

* * *

OPPOSITION BRIEF

(4) (5)

Nos. 08-1553 & 08-1554

Supreme Court, U.S.
FILED
SEP 18 2009
OFFICE OF THE CLERK

In The Supreme Court of the United States

KAWASAKI KISEN KAISHA LTD., *et al.*,

Petitioners,

v.

REGAL-BELOIT CORPORATION, *et al.*,

Respondents.

UNION PACIFIC RAILROAD COMPANY,

Petitioner,

v.

REGAL-BELOIT CORPORATION, *et al.*,

Respondents.

On Petitions For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Although both petitions obscure the questions they present, it appears from the petitions as a whole that they attempt to raise the following questions:

1. The "separate bill of lading" or *Altadis* question: Does the Carmack Amendment, 49 U.S.C. § 11706, apply to the domestic inland leg of a multimodal shipment when no separate bill of lading was issued for that inland leg?

2. The "import" question: Does the Carmack Amendment apply to the domestic inland leg of a multimodal shipment involving an import from a foreign country?

3. The "non-adjacent foreign country" question: Does the Carmack Amendment apply to the domestic inland leg of a multimodal shipment involving trade with a non-adjacent foreign country?

4. The "ocean carrier" question: Does the Carmack Amendment apply in an action against a bill of lading issuer for cargo damage during the domestic rail leg of a multimodal shipment when the issuer is an ocean carrier that also satisfies the statutory definition of a "rail carrier"?

5. The § 10709 "opt-out" question: May a rail carrier rely on 49 U.S.C. § 10709 to avoid the application of the Carmack Amendment to the domestic rail leg of an "exempt" multimodal shipment, and if so under what conditions?

6. The § 10502 "opt-out" question: Under 49 U.S.C. § 10502, may a rail carrier avoid the application of the Carmack Amendment to the domestic rail leg of an "exempt" multimodal shipment without offering the underlying shipper the "alternative terms" that the statute requires?

LIST OF PARTIES

Kawasaki Kisen Kaisha, Ltd. and K-Line America, Inc., petitioners in No. 08-1553, were defendants in the district court and appellees in the court of appeals.

Union Pacific Railroad Company, petitioner in No. 08-1554, was a defendant in the district court and an appellee in the court of appeals.

Respondents in each case are Regal-Beloit Corporation, Victory Fireworks, Inc., PICC Property & Casualty Co. Ltd., and Royal Sun Alliance Insurance Co. Ltd. They were all plaintiffs in the district court and appellants in the court of appeals.

RULE 29.6 STATEMENT

Respondent Regal-Beloit Corporation has no parent corporation, and there is no publicly held company that owns 10% or more of its stock.

Respondent Victory Fireworks, Inc. has no parent corporation, and there is no publicly held company that owns 10% or more of its stock.

The People's Insurance Company (Group) of China and American International Group, Inc. each own more than 10% of the stock of respondent PICC Property & Casualty Co. Ltd.

RSA Insurance Group plc is the ultimate parent corporation of respondent Royal Sun Alliance Insurance Co. Ltd.

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RESPONDENTS' BRIEF IN OPPOSITION

The sum and substance of petitioners' argument is a simple syllogism: Their major premise is that in January 2007 this Court granted certiorari in *Altadis USA, Inc. v. Sea Star Line, LLC*, 549 U.S. 1106 (2007).[1] Their minor premise is that one of the many issues in this case was raised in *Altadis*. They accordingly conclude that this Court should grant certiorari here.

Petitioners' reasoning is flawed. First, circumstances have changed significantly since January 2007. When certiorari was granted in *Altadis*, it appeared that an inter-circuit conflict was creating problems for industry that only this Court could resolve. It has since become clear that under contracts that petitioners themselves draft they have the power to correct any problem that they might perceive with the lower court's rejection of the questionable "separate bill of lading" doctrine. This is not merely a theoretical possibility. Published articles by experienced lawyers who regularly represent carriers in cargo damage litigation show that the contractual solution has already been implemented. Thus no long-term problem exists. At most, this Court

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[1] *Altadis* settled before briefing and oral argument. *See* 549 U.S. 1189 (2007) (dismissing certiorari under Rule 46.1). Since a maximum of $605,000 was in dispute there, the parties presumably decided to settle because too little was at stake to justify the substantial expenditures required to fully brief and argue a merits case in this Court.

might resolve some pending cases that arose under pre-2007 contracts (and prospectively protect carriers who are sloppy in their future contracting). What this Court was willing to undertake almost three years ago would now be an unnecessary use of the Court's judicial resources.

Moreover, the present case differs significantly from *Altadis*. In *Altadis*, this Court agreed to resolve a conflict on a narrow question that was cleanly presented. Petitioners here implicitly ask the Court to answer at least five additional questions – none of which even arguably involves a circuit conflict. Petitioners do not ask this Court to resolve an important question of federal law. The focus of their petitions is rather on the correction of what they characterize as errors. But the court below did not err.

If the "separate bill of lading" question presented in *Altadis* ultimately becomes important enough to require resolution, it will arise again in another case (such as *Altadis*) that presents the issue cleanly. This Court need not accept for review the poor vehicle petitioners offer here.

STATEMENT OF THE CASE

Respondent Regal-Beloit Corp., a Wisconsin manufacturer of electrical and mechanical motion control products, purchased a cargo of electric motors shipped from Shanghai, China, for delivery in

Indianapolis, Indiana. Petitioner Kawasaki Kisen Kaisha, Ltd. (referred to, with its U.S. subsidiary, petitioner K-Line America, Inc., as "K-Line") is a carrier that holds itself out as providing full "door-to-door" service from the point of origin to an ultimate inland destination. K-Line was therefore engaged for the entire multimodal shipment. K-Line issued a through bill of lading assuming responsibility for every aspect of the shipment, including not only the ocean voyage but also the inland rail journey. Rather than performing the inland rail leg itself, however, K-Line subcontracted with petitioner Union Pacific Railroad Co. ("UPRR") to fulfill its contractual undertaking to perform the final leg of the journey.

K-Line safely carried the cargo to the port of Long Beach, California, and delivered it to UPRR for rail carriage to Indianapolis. During that inland leg, however, UPRR's train derailed in Tyrone, Oklahoma, on April 21, 2005, damaging the cargo.[2] Regal-Beloit filed suit in Los Angeles Superior Court claiming $100,000 in compensation for its loss.

The remaining respondents suffered smaller losses under essentially the same circumstances. Respondent Victory suffered $40,893.70 in damages to its cargo bound for Minneapolis. Respondent PICC

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[2] Respondents have not yet had the opportunity to prove the derailment or their damages, but on petitioners' motions to dismiss, the facts alleged in respondents' complaints must be accepted as true.

is subrogated to the claim of an owner that suffered $12,524.07 in damages to a shipment *en route* to Milwaukee. And respondent Royal Sun is subrogated to a $3,012 claim on a shipment to Chicago. Each of these respondents also filed suit in Los Angeles Superior Court.

Petitioners removed all four cases to the district court, where they were consolidated into a single proceeding. After UPRR's motion to transfer the proceeding to New York was denied, petitioners moved to dismiss the action based on the Tokyo forum selection clauses in the K-Line bills of lading.[3]

The district court recognized that the Carmack Amendment, 49 U.S.C. § 11706, generally applies to the domestic rail leg of a multimodal shipment and that the forum selection clauses would be invalid under the Carmack Amendment's venue provisions. But it nevertheless granted petitioners' motions on the ground that they had successfully "opted out" of Carmack coverage under 49 U.S.C. § 10709.

The court of appeals reversed and remanded. It agreed that the Carmack Amendment applies to the

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[3] UPRR's contract with K-Line contained a very different forum selection clause requiring all cargo actions to be brought in Omaha, Nebraska. UPRR – although a U.S. railroad – nevertheless asserted (under a so-called "Himalaya" clause) the benefit of the forum selection clauses in the K-Line bills of lading. It thus argues that this dispute about a U.S. train derailment that occurred on a journey originating in greater Los Angeles should be resolved in Tokyo rather than Los Angeles.

domestic rail leg of a multimodal shipment and that the forum selection clauses would be invalid under the Carmack Amendment. But it concluded that petitioners could not "opt out" of Carmack coverage under 49 U.S.C. § 10709 because the relevant provision for this transaction would be 49 U.S.C. § 10502. The court of appeals remanded for the district court to determine whether petitioners had successfully opted out under § 10502. The remanded matter is still pending in the district court.

REASONS FOR DENYING THE PETITIONS

The court below carefully reviewed this complex case, meticulously analyzed an intricate statutory scheme (through frequent amendments and two recodifications), and correctly resolved each of the many issues before it. Indeed, the most recent scholarly writing on the subject – an authority even petitioners' amici cite, *see* Int'l Group Amicus Br. 15 n.12 – explains in detail why the central holdings in the decision below are correct. *See* Michael F. Sturley, *Maritime Cases About Train Wrecks: Applying Maritime Law to the Inland Damage of Ocean Cargo*, 40 J. MAR. L. & COM. 1 (2009).[4]

[4] Professor Sturley's article was published almost simultaneously with the decision below, and thus does not directly discuss it. But the article analyzes the central issues in the case – including the only issue on which petitioners allege a circuit conflict – and fully supports the lower court's result and reasoning.

UPRR damaged respondents' cargo on April 21, 2005. Four and a half years later, petitioners are still fighting to deny respondents access to the Congressionally guaranteed forum in which they seek compensation for their losses. There is no need for this Court to further prolong the litigation.

I. Petitioners Present No Question Requiring This Court's Intervention.

It is somewhat difficult to identify the precise questions petitioners wish this Court to answer. UPRR (at i) asks "[w]hether the Ninth Circuit must be reversed" and suggests at least three potential errors (one of which raises multiple questions). K-Line (at i) purports to ask a single question but it raises at least three independent issues. And the argument sections of each petition raise additional issues that are not mentioned in either Question Presented. It appears that petitioners want this Court to attempt to micro-manage the lower courts' development of all of transport law.

To assist in the identification of the issues before the Court, this brief (at i) lists the six principal questions that it appears – from the petitions as a whole – that petitioners wish to raise. The "separate bill of lading" question was the issue before the Court

in *Altadis*. The five remaining questions are new to this case.[5] None of the six is currently cert-worthy.

This Court should intervene in a case only when necessary to advance an important public interest. No need exists for the Court's intervention here. Everything that petitioners seek could be achieved without this Court's assistance.

A. Petitioners do not even allege a conflict on most of the issues that they seem to raise.

Unlike *Altadis*, which cleanly presented only the "separate bill of lading" issue, the current case raises at least half a dozen independent issues. *See supra* at i. Petitioners do not even attempt to claim that any of the additional issues involves a circuit conflict. That is not an oversight; there are no such conflicts.

No court of appeals has ever accepted petitioners' "import" argument, *i.e.*, that the recodified Carmack Amendment does not apply to cases involving imports from a foreign country. *See* Sturley, *supra*, 40 J. MAR.

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[5] Because *Altadis* involved a shipment from a U.S. territory rather than a foreign country, it did not implicate the "import" or "non-adjacent foreign country" questions. In this Court the *Altadis* petitioner sought to apply the Carmack Amendment against only the inland carrier, so the "ocean carrier" question did not arise. Because *Altadis* involved motor carriage rather than rail carriage, 49 U.S.C. §§ 10502 & 10709 did not apply, and the comparable provisions for motor carriers were not relevant on the facts of the case.

L. & COM. at 32 & n.185. The cases instead support the decision below. Indeed *Swift Textiles, Inc. v. Watkins Motor Lines, Inc.*, 799 F.2d 697 (11th Cir. 1986) – the principal case on which both petitioners rely so heavily – applied the post-recodification Carmack Amendment to the inland leg of an import shipment. Neither petition cites even a district court case to the contrary. *See* UPRR Pet. 21-22; K-Line Pet. 18-19. Nor does any amicus brief. *See* AAR Amicus Br. 6-9, 12; Int'l Group Amicus Br. 13-15; WSC Amicus Br. 4-7. Moreover, respondents are not aware of any state or federal case to the contrary.

Similarly, no court of appeals has ever accepted petitioners' "non-adjacent foreign country" argument, *i.e.*, that the recodified Carmack Amendment does not apply to cases involving trade with a non-adjacent foreign country. *See* Sturley, *supra*, 40 J. MAR. L. & COM. at 34 & nn.193-94. Once again, the cases support the decision below. Even petitioners' leading case applied the post-recodification Carmack Amendment to a shipment from non-adjacent Switzerland. *See Swift*, 799 F.2d at 698. Again, neither petition nor any amicus brief cites even a district court case to the contrary. *See* UPRR Pet. 22-23, 27; K-Line Pet. 19-22; AAR Amicus Br. 6-9; WSC Amicus Br. 5-7; *cf.* Int'l Group Amicus Br. 13 n.11 (listing "recent cases [that] have applied the Carmack Amendment to multimodal carriage from or to non-adjacent foreign countries"). Again, respondents are not aware of any state or federal case to the contrary.

Only K-Line makes the "ocean carrier" argument, contending that a company qualifying as an ocean carrier cannot also satisfy the Carmack "rail carrier" definition, and thus cannot be subject to the Carmack Amendment. Although K-Line (at 21) hints that the decision below may be in tension with *Rexroth Hydraudyne B.V. v. Ocean World Lines*, 547 F.3d 351 (2d Cir. 2008), on the "ocean carrier" question, there is (as K-Line implicitly concedes) no conflict. *Rexroth* involved no cargo damage during inland carriage that could implicate the Carmack Amendment.[6] The only other appellate decision to address the "ocean carrier" issue appears to be *United States v. Mississippi Valley Barge Line Co.*, 285 F.2d 381, 391-94 (8th Cir. 1960), in which the Eighth Circuit (in an opinion by then-Judge Blackmun) reached the same conclusion as the court below.

Only UPRR (at 28-35) raises the "opt-out" questions. On the § 10709 opt-out question, it argues that it may rely on § 10709 in the circumstances of this case to avoid the statutory requirements of the Carmack Amendment despite the admitted application of § 10502, and despite the original shipper's failure to receive the "alternative terms" that the statute requires. On the § 10502 opt-out question, UPRR similarly argues that it may rely on § 10502 to avoid the Carmack Amendment. For each question,

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[6] *Rexroth* involved a misdelivery by the contracting carrier after the safe completion of the inland carriage. *See* 547 F.3d at 354.

UPRR simply argues that this Court should correct what it characterizes as an error below. It cites no other judicial decisions that have even addressed the "opt-out" questions, let alone resolved either of those questions in conflict with the decision below.

In the absence of any conflict on the five non-*Altadis* questions that petitioners raise, there is no need for this Court's intervention. Those issues should be allowed to percolate so that this Court can see whether a problem develops and (if a problem does develop) can have the benefit of the courts of appeals' analysis before tackling the subject. For the time being, at least, the matter can safely be left to the lower courts.

B. The one conflict that petitioners raise is not so entrenched as they claim.

Petitioners argue that this Court should hear all six of their issues based on a single conflict over the "separate bill of lading" question. But even that conflict is not so entrenched as petitioners assert. The entire line of cases supporting petitioners' argument is anchored on an isolated dictum in *Swift* that even petitioners recognize as being inconsistent with the holding. *See* UPRR Pet. 17.[7] The circuits on petitioners' side of the conflict generally followed that

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[7] Some courts have suggested that the entire "separate bill of lading" doctrine may be based on a typographical error. *See* Sturley, *supra*, 40 J. MAR. L. & COM. at 10 & n.51 (citing cases).

dictum blindly, with no analysis whatsoever. Most tellingly, none of the courts directly or indirectly adopting that dictum analyzed the governing statutory language.

The only courts of appeals that have carefully analyzed the issue and considered the statutory language – the court below and the Second Circuit in *Sompo Japan Insurance Co. v. Union Pacific Railroad Co.*, 456 F.3d 54 (2d Cir. 2006) – both rejected the "separate bill of lading" doctrine. Moreover, recent scholarship has explained in detail why there is no legitimate basis for the doctrine. *See* Sturley, *supra*, 40 J. MAR. L. & COM. at 8-26.

None of the courts adopting the questionable doctrine considered any of the arguments raised in *Sompo*, the decision below, or the recent scholarship. All but one of the cases supporting petitioners were decided before *Sompo*. And *Altadis* was decided so soon after *Sompo* that the Eleventh Circuit was unaware of it.[8] The conflict cannot be considered "entrenched" until the courts on each side have considered the opposing arguments and rejected them. At the very least, this Court should postpone further consideration of this issue and allow it to

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[8] The Eleventh Circuit's *Altadis* panel erroneously thought that the only authority contrary to its conclusion was the Ninth Circuit's earlier decision in *Neptune Orient Lines, Ltd. v. Burlington Northern & Santa Fe Ry. Co.*, 213 F.3d 1118, 1119 (9th Cir. 2000). *See Altadis*, 458 F.3d at 1292 n.9 (citing *Neptune* and characterizing "[t]he Ninth Circuit's holding and discussion" as "limited to a single sentence").

percolate until the courts following the *Swift* dictum have had an opportunity to reconsider their positions in light of the compelling arguments on the other side. If one of those courts adheres to its error, this Court could then review that decision.

C. Petitioners themselves have the contractual power to correct any perceived problem without any action by this Court.

Even if the court below had erred on any of the six questions that petitioners implicitly raise here, this Court would not need to address the issue. Petitioners already have the ability to avoid the impact of the decision below by contract. Indeed, the decision below provides a virtual roadmap for petitioners and other carriers in future cases. They need only offer the true shipper the option of Carmack terms (as Congress required).

For carriers that deal directly with the shipper (such as K-Line in this case), offering Carmack terms is simply a matter of ensuring that their boilerplate contracts (drafted by their lawyers) comply with the Congressional mandate. Contrary to amicus WSC's suggestion (at 9-10), the carrier need not know which inland carrier will ultimately handle the road or rail leg. For those shippers that elect Carmack terms, the carrier can simply purchase sufficient insurance to cover the potential cargo loss or damage claims at Carmack levels (and pass on any higher cost to the

shipper).[9] This would not create a practical problem for these carriers. On the contrary, their contracts with the inland carriers (which have been revised in the three years since *Sompo*) already require them to provide this option to the original shippers. *See infra* at 13-14.

UPRR (at 14, 33) complains that it would be "utterly impractical" for an inland carrier to "ensure[ ] that the overseas shipper – with whom [it] has no direct contact – is . . . offered contractual terms consistent with Carmack." That argument is disingenuous. Not only is it practical for inland carriers to protect themselves in this fashion, but after *Sompo* railroads began doing exactly that. They have already revised their standard contracts to require the original carriers (such as K-Line) to give the necessary choice to the original shippers. If an original carrier fails to give an original shipper that choice, then the original carrier must indemnify the railroad for any liability imposed on the railroad as a result. As one commentator explained:

> Under the revision [to the standard contract that governs the legal relationship between railroads and ocean carriers], the ocean carrier, as the railroad's contract shipper, is obligated to indemnify the railroad if the railroad loses its limitations of liability

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[9] Such insurance would provide any necessary protection regardless of the choice of inland carrier or the form of sub-contract that the ocean carrier concluded with the inland carrier.

> because the ocean carrier did not put its own shipper on notice of the railroad's liability limitations and Carmack opt out provisions. In short, the railroads are throwing the obligation of Carmack notification onto the ocean carriers.

Paul Keane, *US Law – COGSA Limitations and Intermodal Transport*, 192 GARD NEWS 22, 24 (2008); *see also* Sturley, *supra*, 40 J. MAR. L. & COM. at 40 & n.228 (citing carriers' lawyers and others' explanations of actions that have been taken and that could be taken to further protect carriers).[10]

This Court need not protect petitioners from the consequences of their own actions. The decision below explains how Congress has already given them the tools to protect themselves by contract. More significantly, inland carriers are already using those tools. The only reason this case is here is that the governing contracts were concluded in 2005 – over a year before *Sompo* reminded inland carriers of the need to comply with the terms of the governing federal statute. There is no reason to believe that such cases will continue to arise now that revised contracts address the issue. If they do the Court could

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[10] Since all of the commentary discussing the contractual solutions was published after January 2007, those solutions would not have been well-established, let alone well-known, when certiorari was granted in *Altadis* (less than six months after *Sompo* was decided).

address the issue in a future case (assuming it were truly a problem warranting this Court's attention).

D. The Surface Transportation Board should address any problems with the application of the opt-out provisions.

As carriers' lawyers recognize, *see supra* at 13-14 & n.10, the statutory opt-out provisions, 49 U.S.C. §§ 10502 & 10709, already give petitioners all the protection they may need. The decision below does not alter that. If petitioners truly desire "guidance regarding how to read § 10502 and § 10709 in tandem," UPRR Pet. 12, they should seek relief in the first instance not from this Court but from the Surface Transportation Board (STB), which could initiate a rule-making proceeding to provide that guidance. This is not an abstract suggestion. The STB is currently addressing closely related issues and would thus be the logical entity initially to consider the two "opt-out" questions raised here.

The STB began addressing the scope of § 10709 more than two years ago. *See Interpretation of the Term "Contract" in 49 U.S.C. 10709*, 72 Fed. Reg. 16316 (2007) [STB Ex Parte No. 669]. Another STB proceeding on the parameters of § 10709 is now pending. *See Rail Transportation Contracts Under 49 U.S.C. 10709*, 74 Fed. Reg. 416 (2009) [STB Ex Parte No. 676]. Expanding that proceeding (or more likely instituting a new one) to address the relationship between § 10502 and § 10709 would be a logical

addition to the STB agenda, particularly since § 10502 is simply a grant of authority to the STB.[11]

II. Even If This Court Wished To Resolve The One Conflict That Petitioners Raise, This Case Would Be A Very Poor Vehicle.

Because events of the last two and a half years show that petitioners can fully protect their interests by contract, this Court's intervention is unnecessary. *See supra* part I. If the Court nevertheless wishes to resolve the one conflict on which petitioners build their argument, this would still be a very poor case in which to do so. The Court should instead wait for a suitable vehicle (such as *Altadis*). If the issue is really important enough to warrant this Court's attention, it will arise again in another case that presents the issue cleanly. The Court need not accept the poor vehicle that petitioners offer here.

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[11] In any event, it would be premature for this Court to address the two opt-out questions on an interlocutory basis. The district court should at least have the opportunity to decide on remand whether petitioners satisfied the statutory requirements to opt out of Carmack coverage under § 10502, as UPRR (at 32) claims. If the district court were to rule for petitioners in the already-pending remand action, it would moot their remaining arguments.

A. The other issues that petitioners raise are likely to interfere with this Court's ability to reach the "separate bill of lading" question.

If the Court wishes to resolve the "separate bill of lading" question (the only issue on which petitioners even claim a circuit conflict), a case such as *Altadis* that raises only that issue would provide a more suitable vehicle.

A suitable case could arise in any domestic trade,[12] including multimodal shipments to or from Hawaii, Puerto Rico, the U.S. Virgin Islands, Guam, American Samoa, or any other overseas territory (*see, e.g.*, *Altadis*); multimodal shipments with a sea leg between coasts (*e.g.*, between California and New York); multimodal shipments with an intracoastal sea leg (*e.g.*, between Alaska and California or between New York and Florida); and interstate multimodal carriage that includes a river leg. Such commerce is already routine. It is likely to become even more common in light of current efforts to divert commercial traffic from overcrowded highways to coastal waterways. *See, e.g.*, Energy Independence and Security Act of 2007, Pub. L. No. 110-140, § 1121(a), 121 Stat. 1492, 1760-61 (2007) (codified at 46 U.S.C.

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[12] A suitable case could also arise in an export shipment to Canada or Mexico (such as a shipment from Honolulu to Vancouver), but such shipments are less common than the domestic examples discussed in the text.

§§ 55601-05) (establishing short sea transportation program).

If petitioners were correct about the importance of the issue and the need for this Court's intervention, cases raising the issue in a suitable context would occur with some frequency. If a good vehicle does not arise soon, it will presumably be because carriers have already addressed the issue by contract, *see supra* at 12-15, thus avoiding the need for judicial action. It would in any event prove that this Court's intervention was unnecessary.

If the Court instead hears a case such as this one, with so many other issues, there is a risk that it would never reach the "separate bill of lading" question. If this Court were to agree with petitioners on any of their alternative arguments, it would be unnecessary to reach the "separate bill of lading" question (and anything said about that issue could well be dictum). And if the Court agrees with respondents on the "separate bill of lading" question (as it should), it would still be required to wade through all of the other issues (on which there is no conflict) in order to decide the case. It makes no sense for this Court to attempt to micro-manage the lower courts' development of transport law simply to resolve a conflict that the parties themselves could have avoided – and indeed have subsequently avoided – by contract.

B. The underlying dispute in this case lies outside the scope of any policy guidance that *Kirby* might provide.

Both UPRR (at 27-28) and K-Line (at 20-21) contend that the decision below is inconsistent with *Norfolk Southern Railway Co. v. James N. Kirby, Pty Ltd.*, 543 U.S. 14 (2004). That is simply wrong.[13] As the applicability of the Carmack Amendment was not before the *Kirby* Court (because the issue had not been preserved below), nothing in *Kirby* could be controlling. *See* Sturley, *supra*, 40 J. MAR. L. & COM. at 18-20.

Furthermore, maritime law's emphasis on uniformity does not support petitioners. Denying Carmack applicability to the inland leg of a multimodal shipment would not foster uniformity but "would instead frustrate an explicitly articulated federal policy of uniformity." *Id.* at 21. It would simply permit a carrier to benefit from whatever terms it included in its standard-form contract, however idiosyncratic they might be. In *Altadis*, for

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[13] Amicus International Group is also wrong to suggest (at 18-21) that the decision below is in tension with the U.S. position in negotiating the Rotterdam Rules. The U.S. delegation fully supported the railroad industry's insistence that it remain subject to the Carmack Amendment and that the uniform maritime regime not apply to it – the exact opposite of the position that UPRR takes before this Court. Professor Sturley, who was an active member of the U.S. delegation, addresses this subject in detail. *See* Sturley, *supra*, 40 J. MAR. L. & COM. at 37-39.

example, displacing the Carmack Amendment resulted in the application of a non-uniform variation of the time-for-suit provision in the Carriage of Goods by Sea Act (COGSA). *See id.* at 21-23. Similarly, in this case (in sharp contrast with *Kirby*) petitioners are not seeking to enforce a provision in COGSA because no COGSA provision is relevant.[14] They instead seek to enforce K-Line's boilerplate provision in an adhesion contract that seeks to undermine the uniform Carmack rule that Congress enacted.

In any event, the current case is outside the scope of *Kirby*, which was concerned only with providing guidance for "liability limitations for negligence resulting in damage." *Kirby*, 543 U.S. at 33. Thus when it considered a new agency principle in federal maritime law to address relations between shippers (such as respondents) and sub-contracting carriers (such as UPRR), *see id.* at 32-35, the Court focused on "a *single*, *limited* purpose," *id.* at 34 (emphasis in *Kirby*). That purpose was "limitation on liability" against the backdrop of state agency law. *Id.*

Forum selection clauses, the underlying issue here, are completely outside the *Kirby* scope. Even if that had not already been clear from *Kirby* itself, it

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[14] In *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528 (1995), this Court rejected the argument that COGSA § 3(8) addresses forum selection clauses – thus leaving their validity to be determined under the general principles of federal maritime law as formulated in non-COGSA cases. *See* 515 U.S. at 533-34.

became abundantly clear in a GVR six days later. This Court granted certiorari in a forum selection clause case that had been held for *Kirby*, vacated the decision below, and remanded the case "for further consideration in light of [*Kirby*]." *Green Fire & Marine Insurance Co., Ltd. v. M/V Hyundai Liberty*, 543 U.S. 985 (2004). The court below in *Green Fire* had applied an agency rule in the forum selection clause context that was consistent with the agency rule that *Kirby* applied in the limitation of liability context. The *Kirby* Court explicitly criticized that application, *see Kirby*, 543 U.S. at 33-34, thus emphasizing the narrow limitation on the scope of its decision. And the GVR reinforced that signal. If the Court had intended to apply *Kirby*'s principles in the forum selection clause context, it could simply have denied certiorari in *Green Fire*. But it instead vacated the decision and remanded the case.[15] Petitioners' effort to implicate *Kirby* is unavailing in view of the narrow holding of that decision, coupled with the Court's action in *Green Fire*.

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[15] On remand, the court below did not adhere to its original approach but instead decided the case on other grounds. *See Kukje Hwajae Ins. Co. v. The M/V Hyundai Liberty*, 408 F.3d 1250 (9th Cir. 2005).

CONCLUSION

The petitions for a writ of certiorari should be denied.

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REPLY BRIEF

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IN THE

Supreme Court of the United States

KAWASAKI KISEN KAISHA LTD. and
K-LINE AMERICA, INC.,
Petitioners,

v.

REGAL-BELOIT CORPORATION *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

Respondents do not dispute that the decision below conflicts with the decisions of four other circuits on the question whether the Carmack Amendment applies to overseas "through" bills of lading. Nor do respondents disagree that settlement in *Altadis USA, Inc. v. Sea Star Line, LLC*, 549 U.S. 1106 (2007), prevented this Court from resolving that conflict after granting certiorari to do so.

Respondents assert only that, in the last two years, carriers supposedly have found a "contractual solution" obviating any need to resolve this conflict. But contrary to respondents' argument, any such contractual solution is non-existent or illusory. As

demonstrated in the briefs filed by *amici curiae* representing railroads, international shipping lines, and organizations that insure nearly 90% of international shipping, all of whom argue that certiorari should be granted, having to opt out of Carmack by contract would sacrifice flexible and efficient shipping practices enabled by the container revolution. Nor do respondents offer any other credible basis to suppose that the ongoing conflict can be resolved without this Court's guidance.

Respondents also assert that this case is a poor vehicle for resolving the conflict because this Court might address other issues in the course of addressing the merits of the question presented. This is no ground for denying certiorari on a square conflict. In any event, contrary to respondents' assertion, this case provides a good vehicle for considering the question in its fullest practical context. The petitions should be granted.

ARGUMENT

I. CONTRARY TO RESPONDENTS' ARGUMENT, THE CONFLICT IN THE CIRCUITS HAS NOT BEEN OBVIATED BY ANY "CONTRACTUAL SOLUTION"

Respondents assert that "circumstances have changed" in the two years since the grant in *Altadis* because the shipping industry has implemented a "contractual solution" to the uncertainty created by the conflict in the circuits. Opp. 1, 12-15. According to respondents, carriers can free themselves from the impact of the decision below simply by inserting in their contracts new boilerplate offering Carmack terms, and supposedly have widely done so. Opp. 12-13. But that is not true, as made clear in the briefs

filed in support of the petitions by *amici curiae* The World Shipping Council and The International Group of Protection and Indemnity (P&I) Clubs.

To the contrary, "most, if not all, ocean carrier bills of lading do *not* contain such Carmack language," as the key source cited by respondents itself reports. Paul Keane, *US Law—COGSA Limitations and Intermodal Transportation*, 192 GARD NEWS 22, 23 (2008) (emphasis added). Respondents miscite this source to suggest that a supposedly single "standard contract that governs the legal relationship between railroads and ocean carriers . . . has been revised" (Opp. 13), when in fact the passage they quote merely states that "one of the two railroads [accepting overseas intermodal cargo] on the West Coast has issued a revision to its intermodal circular" (192 GARD NEWS at 24).

Carriers' general refusal to adopt respondents' "contractual solution" is not surprising, as to do so would sacrifice the flexible and efficient practices ocean carriers currently employ in shipping overseas goods. Rather than arranging individual shipments with specific inland carriers prior to shipping, ocean carriers negotiate contracts with multiple carriers for a volume of shipments over several-year periods, with correspondingly reduced volume rates. *See* World Shipping Council Br. 9. Ocean carriers also often decide which inland carriers to use after the shipment is underway or has reached its port of discharge—which may change en route because of port congestion, sale of the cargo in transit, or changes in the shipper's plans. *See* Int'l P&I Clubs Br. 5; World Shipping Council Br. 6, 9. Under current practices, ocean carriers thus are able to choose inland transportation after the final port of

discharge has been reached and to base that choice on availability and other considerations. *See* World Shipping Council Br. 9.

Respondents' "contractual solution" would force carriers to abandon these flexible and efficient practices. To opt out of Carmack under the decision below, an ocean carrier must offer to the party shipping the goods, at the time the shipping contract is executed, terms incorporating Carmack's rights and procedures for inland transportation. Pet. App. 32a-33a. Because railroads and other ground carriers offer different terms for transporting under Carmack rules, ocean carriers wishing to opt out of Carmack would have to designate an inland carrier at the time of contracting—limiting their ability to change ports of discharge en route or to select inland transportation based upon availability or other considerations at the time of arrival. And the additional cost of any extra protection Carmack affords is unnecessary because shippers can insure their shipments, which they can value more easily and accurately than can carriers. *See, e.g., Carman Tool & Abrasives, Inc. v. Evergreen Lines*, 871 F.2d 897, 901 (9th Cir. 1989).

Thus no "contractual solution" has diminished the importance of clarifying whether Carmack applies to overseas "through" bills of lading.[1]

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[1] Nor has the practical importance of uniformity in maritime law diminished in the last two years. Respondents suggest (Opp. 20) that this Court's statement concerning the importance of such uniformity in *Norfolk So. Ry. Co. v. James N. Kirby, Pty. Ltd.*, 543 U.S. 14, 29 (2004), is inapposite because *Kirby* concerned liability limitation. That is incorrect, for *Kirby* also discussed the law governing overseas "through" bills of lading, *id.* at 22-30, and its observation concerning uniformity arose in that discussion, *id.* at 29.

II. RESPONDENTS FAIL TO SHOW THAT THE CURRENT 4-2 CIRCUIT SPLIT WILL BE RESOLVED WITHOUT THIS COURT'S INTERVENTION

Respondents suggest that the current 4-2 circuit split is "not so entrenched" (Opp. 10), but offer no reason to believe that the split will resolve itself without this Court's intervention. Nor is this likely. In three of the four circuits, panel decisions may be overruled only *en banc*, *see Rutherford v. Columbia Gas*, 575 F.3d 616, 619 (6th Cir. 2009); *McMellon v. United States*, 387 F.3d 329, 332-33 (4th Cir. 2004); *Cargill v. Turpin*, 120 F.3d 1366, 1386 (11th Cir. 1997), and in the fourth a majority of judges must acquiesce to overruling a panel decision, 7TH CIR. R. 40(e).

Respondents also suggest waiting so that other circuits can digest the Second Circuit's decision in *Sompo Japan Insurance Co. v. Union Pacific Railroad Co.*, 456 F.3d 54 (2d Cir. 2006), or a recent law review article. Opp. 10-11. *Sompo*, however, was decided before this Court granted certiorari in *Altadis* and was discussed at length in the petition. *See* Petition for Writ of Certiorari at 2-25, *Altadis USA, Inc. v. Sea Star Line, LLC*, No. 06-606, 2006 WL 3101141 (U.S. Nov. 1, 2006). In the three years since *Sompo*, no other circuit has reconsidered its position, and respondents offer no evidence that any will do so in the future.[2]

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[2] Respondents also criticize "circuits on petitioners' side of the conflict" (Opp. 10) for relying on *Swift Textiles, Inc. v. Watkins Motor Lines, Inc.*, 799 F.2d 697 (11th Cir. 1986), when that case applied Carmack to the inland leg of an import shipment (Opp. 8). The holding in *Swift* is inapposite, however, because there was no "through" bill of lading in that case. *See id.* at 698.

Nor is there any reason to suppose that any circuit will change its view in light of a law review article respondents describe as the "most recent scholarly writing on the subject." Opp. 5, citing Michael F. Sturley, *Maritime Cases About Train Wrecks: Applying Maritime Law to the Inland Damage of Ocean Cargo*, 40 J. MAR. L. & COM. 1 (2009). As respondents conspicuously fail to note, Professor Sturley represented shippers in both *Altadis* and *Kirby*.[3] Moreover, Professor Sturley errs in arguing that the pre-codification limits on Carmack should be ignored, *see id.* at 34, in spite of Congress's express admonition that the 1978 codification of Carmack "may not be construed as making a substantive change," Act of Oct. 17, 1978, Pub. L. No. 94-473, § 3(a), 92 Stat. 1337, 1466; *see* Int'l P&I Clubs Br. 15 n.12. Professor Sturley also fails to address Carmack's venue provisions (*see* Pet. 18), the 1920 amendment to the Interstate Commerce Act (*see* Pet. 22 n.6), or the federal appellate decisions prior to Carmack's codification in 1978 and to Carmack's reenactment in 1995 (*see* Pet. 19 n.5; Union Pacific Pet. 26). Nor does Professor Sturley provide any support for the Ninth Circuit's rulings concerning ocean carriers, *see* Sturley, *supra*, 40 J. MAR. L & COM. at 17 n.71, or the application of Section 10709's opt-out provision, *see id.* at 40 n.226.

This Court's intervention thus is still required if the circuit split that led to the *Altadis* grant is to be resolved.

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[3] *See* Petition for Writ of Certiorari, *Altadis USA, Inc. v. Sea Star Line, LLC*, No. 06-606, 2006 WL 3101141 (U.S. Nov. 1, 2006); *Kirby*, 543 U.S. at 17.

III. CONTRARY TO RESPONDENTS' ARGUMENTS, THIS CASE IS A GOOD VEHICLE FOR CLARIFYING WHETHER CARMACK APPLIES TO OVERSEAS INTERMODAL "THROUGH" BILLS OF LADING

Respondents do not contest that the material facts here are undisputed, there are no threshold issues, and reversal of the decision below would entail dismissal of the complaint. *See* Pet. 25; Union Pacific Pet. 25. Respondents nonetheless argue that this case is a poor vehicle for resolving a clear circuit conflict because resolution on the merits might entail consideration of further issues that, in respondents' view, should be allowed to percolate in the lower courts. Opp. 7-10, 17-18. This contention does not withstand analysis.

In the first place, respondents' attempt (*see* Opp. i) to fracture the simple question presented here into innumerable subparts is unavailing, for it conflates the question presented with reasons why the decision below was erroneous on the merits. The inapplicability of Carmack to ocean carriers, to imports, or to shipments from non-adjacent foreign countries, for example, are all reasons why Carmack should not be construed to govern intermodal overseas shipments under "through" bills of lading—not additional questions presented. *See* Pet. 17-20. Similarly, the opt-out provisions discussed in the petitions help show why Carmack does not apply to "through" bills that extend COGSA to inland transportation, as most such bills continue to do.

In any event, the presence of these additional arguments makes this case a better, not a worse, vehicle for considering the question presented. Because this case involves all the issues affecting

Carmack's application to overseas "through" bills of lading (*see* Pet. 25-26), it provides the Court with an opportunity to resolve the question in a single case while taking into account all relevant practical considerations.

Respondents argue that these additional arguments create a risk that the conflict among the circuits will not be resolved. Opp. 18. But the conflict will be resolved if the Court holds that Carmack does not apply to overseas "through" bills of lading based on arguments advanced in the petition.[4] In addition, the opt-out issues would become relevant only if the Court rejected the arguments concerning Carmack's applicability. And if the Court held that carriers may opt out of Carmack by extending COGSA to the inland leg of an overseas shipment, then Carmack would not apply to current "through" bills of lading, and the conflict would be resolved as a practical matter.

Respondents also urge this Court to allow the additional arguments raised in the petition to percolate in the lower courts. Opp. 10. But the four circuits already holding Carmack inapplicable to "through" bills have no reason to consider these arguments. Nor does the Ninth Circuit, which has considered and rejected the arguments raised in the petition. *See* Pet. App. 12a-19a, 26a-35a. The Second Circuit has addressed most of these arguments as well. *See Sompo*, 456 F.3d at 60-69 & n.13 (considering Carmack's application to goods imported

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[4] The one possible exception is the argument that petitioners are ocean carriers. This might not resolve the question if Carmack is interpreted to permit different treatment of ocean carriers and inland carriers under the same bill of lading.

from non-adjacent foreign country under a "through" bill of lading); *Rexroth Hydraudyne B.V. v. Ocean World Lines*, 547 F.3d 351, 356-64 (2d Cir. 2008) (considering Carmack's application to ocean carriers). Indeed, the Second Circuit has compounded the conflict presented here by holding, contrary to the decision below, that Carmack does *not* apply to ocean carriers issuing "through" bills of lading. *Id.*

Nor are arguments concerning the application of Carmack to overseas container shipments likely to percolate in other circuits. The six circuits that already have addressed this issue encompass the six largest ports in the country and more than 90% of the nation's container imports flow through them. *See* U.S. Dep't of Transp., Maritime Admin., U.S. Waterborne Foreign Container Trade by U.S. Custom Ports, http://www.marad.dot.gov/library_landing_page/data_and_statistics/Data_and_Statistics.htm.

This case thus presents a good vehicle for resolving the question presented, and that question will not be resolved without this Court's guidance.

CONCLUSION

For the reasons stated above and in the petition, the Court should grant this petition as well as the separate petition for certiorari filed by the Union Pacific Railroad Company from the same judgment, and consolidate both petitions for argument.

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AMICUS CURIAE BRIEF

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Petitioner,

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On Petition For Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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INTEREST OF THE *AMICI CURIAE*[1]

American Steamship Owners Mutual Protection and Indemnity Association, Inc.; Assuranceforeningen Gard (Gjensidig); Gard P&I (Bermuda) Ltd.; Assuranceforeningen Skuld (Gjensidig); Skuld Mutual Protection and Indemnity Association (Bermuda) Ltd.; The Britannia Steam Ship Insurance Association Ltd.; The Japan Ship Owners' Mutual Protection & Indemnity Association; The London Steam-Ship Owners' Mutual Insurance Association Ltd.; The North of England Protecting and Indemnity Association Ltd.; The Shipowners' Mutual Protection and Indemnity Association (Luxembourg); The Standard Steamship Owners' Protection and Indemnity Association (Asia) Ltd.; The Standard Steamship Owners' Protection and Indemnity Association (Bermuda) Ltd.; The Standard Steamship Owners' Protection and Indemnity Association (Europe) Ltd.; The Standard Steamship Owners' Protection and Indemnity Association (London) Ltd.; The Steamship Mutual Underwriting Association Ltd.; The Steamship Mutual Underwriting Association (Bermuda) Ltd.; Sveriges Ångfartygs Assurans Förening (Swedish Club); United Kingdom

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[1] No counsel for any party authored this brief in whole or in part, and no person other than the *amici curiae* represented in this brief made any monetary contribution to its preparation or submission. Written consents from the parties to the filing of this brief are on file with the Clerk of the Court. The parties were notified ten days prior to the due date of this brief of the intention to file.

Mutual Steam Ship Assurance Association (Bermuda) Ltd.; United Kingdom Mutual Steam Ship Assurance Association (Europe) Ltd.; and The West of England Ship Owners' Mutual Insurance Association (Luxembourg) – together known as the International Group of Protection and Indemnity (P&I) Clubs[2] respectfully submit this brief as *amici curiae* in support of Petitioners.

Amici P&I Clubs comprise thirteen insurance associations known as "protection and indemnity clubs" (often abbreviated "P&I clubs"). P&I clubs are "associations of shipowners banded together to spread and absorb liabilities falling on their members." GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY 76 (2d ed. 1975).[3] The individual P&I Clubs as *amici curiae* here form together a trade association known as the International Group of P&I Clubs.

The members of the Amici P&I Clubs are owners, operators, and charterers of ships of practically all maritime nations. The thirteen clubs represented here insure nearly ninety percent (90%) of the world's ocean-going ship tonnage. The P&I Clubs themselves

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[2] The *amici curiae* will be referred to hereinafter as "Amici P&I Clubs."

[3] For a discussion on the history and function of P&I clubs, *see* THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 19-12 (4th ed. 2004), and Mark Tilley, *The Origin and Development of the Mutual Shipowners Protection & Indemnity Association*, 17 J. MAR. L. & COM. 261 (1986).

are non-profit mutual organizations. Their member shipowners insure one another on an indemnity basis against a variety of third-party liabilities relating to the use and operation of ships.

INTRODUCTION

This case raises an issue that affects virtually all the multimodal carriage of cargo in ocean containers between non-adjacent foreign countries and the United States. In 2008, U.S. ocean container ports handled 28.2 million TEUs,[4] nearly all of which were transported throughout the country by either rail or truck carriers. U.S. DEP'T OF TRANSP., BUREAU OF TRANSP. STATISTICS, AMERICA'S CONTAINER PORTS: FREIGHT HUBS THAT CONNECT OUR NATION TO GLOBAL MARKETS 3, 16 (2009). Uniformity and predictability of maritime law are essential not only to the Amici P&I Clubs, but also to world commerce. Insurance may be arranged for vessel interests more efficiently if the law that governs the carriage of cargo is uniform and predictable. The application of one law, the Carriage of Goods by Sea Act ("COGSA"), ch. 229, Pub. L. No. 74-521, 49 Stat. 1207 (1936) (re-printed in Note following 46 U.S.C. § 30701); Petition for Writ of Certiorari, Kawasaki Kisen Kaisha Ltd. and K-Line

[4] Because shipping containers are of various lengths, the TEU (twenty foot equivalent) was developed as the standard measure for counting containers. One 40 foot container equals 2 TEUs.

America, Inc., *petition for cert. filed* June 18, 2009, (hereinafter "K-Line Pet." or "Pet.") App. 48a-61a, throughout the entire door-to-door multimodal carriage of goods is extremely beneficial to all parties involved in multimodal carriage and the efficient operation of multimodal movements.

If, instead of COGSA, the Carmack Amendment to the Interstate Commerce Act[5] ("Carmack") were to apply to the U.S. inland part of multimodal carriage, the inland carriers or the contracting carriers would, according to the lower court opinion in this case, have to give the shipper a fair opportunity to demand full Carmack coverage, which is quite different than COGSA. Full Carmack rignts would have to be offered as the primary regime to govern the inland carriage. Pet. App. 33a-35a. The Carmack carrier could only offer, as alternative terms, terms that are uniform with the terms of the multimodal contract of carriage evidenced by the ocean bill of lading.

Offering such a fair opportunity and the notice of the alternative bill of lading terms required by Carmack to the shipper would be very difficult if not impossible in practice. In multimodal carriage, the

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[5] The Carmack Amendment is codified at 49 U.S.C. §§ 10101 et seq. Part A governs rail transportation and begins at 49 U.S.C. § 10101. Part B governs Motor Carriers, Water Carriers, Brokers, and Freight Forwarders and begins at 49 U.S.C. § 13101. This brief shall refer to this legislation as the "Carmack Amendment" or as "Carmack." *See* K-Line Pet. App. 62a-91a.

inland carrier does not contract directly with the shipper. The shipper contracts with the contracting carrier, which may be a non-vessel operating common carrier (NVOCC) or a vessel operating common carrier (VOCC) or some other kind of contracting carrier. The contracting carrier might contract directly or indirectly with the U.S. inland carrier. The contracting carrier probably would not know which inland carrier would perform the U.S. inland carriage or the terms of that unknown carrier's contract at the time it contracted with the shipper. Without that knowledge, the contracting carrier could not give the shipper notice of the alternate terms a particular inland carrier wished to use.

Moreover, if more than one law were to govern various parts of each carriage, resolution of claims for loss or damage would be needlessly and wastefully complicated. Before the merits of a claim could be addressed, the applicable law (Carmack or COGSA) would have to be determined. The applicable law could not be ascertained until the location of the loss or damage and the location of its cause were determined.[6]

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[6] Moreover, if COGSA governed the ocean part of the carriage and Carmack governed the land part, the receiver would want to make a claim against both the ocean carrier and a land carrier, whose liability may be higher than the ocean carrier's. Carmack imposes a strict, insurer-type liability scheme on the carrier while COGSA employs a fault-based liability scheme. *See Sompo Japan Ins. Co. of America v. Union Pacific R.R. Co.*, 456 F.3d 54, 58 (2d Cir. 2006); *Rankin v. Allstate Ins.*

(Continued on following page)

The location of the loss or damage or the location of its cause may be difficult or impossible to prove. Ocean containers used for multimodal transportation are generally not opened during their carriage; as a result, damage or loss is often not discovered until the container reaches its final destination and is opened by its receiver. If different legal regimes required shippers to open and inspect containers as they were transferred from one mode or party to another, the transportation would be slowed and cargo might be damaged or pilfered. The ocean container has greatly reduced damage and loss during transportation.[7] This advantage should not be lost by a need to open containers in transit.

Co., 336 F.3d 8, 9 (1st Cir. 2003); *see also Missouri P. R. Co. v. Elmore and Stahl*, 377 U.S. 134, 137 (1964). If COGSA governed the entire carriage, the receiver could prove its prima facie case simply by proving delivery of a certain quantity of cargo to the carrier in good order and condition and delivery by the carrier in damaged condition, or that some cargo was missing when it was delivered to its receiver. The claim would be governed only by COGSA. There would be no reason for cargo interests to attempt to improve their chances of recovery by suing the inland carrier in addition to the contracting carrier.

[7] *See generally* MARC LEVINSON, THE BOX 1-4 (2006) (suggesting that the container shaped the world economy by reducing the time and costs of shipping); Henry A. Tombari, *Trends in Oceanborne Containerization and its Implications for the U.S. Liner Industry*, 10 J. MAR. L. & COM. 311, 311-12 (1979). ("Overall, the advantages of containerization over the breakbulk system are to reduce (i) the time and effort needed to handle cargo; (ii) possible theft and damage; (iii) time required to move from point of origin to final destination and (iv) a ship's turn around time in port.").

All of the foregoing weighs heavily in favor of applying a uniform law (COGSA) to the international, multimodal carriage of goods between a non-adjacent foreign country and a place in the United States. But the disuniformity under current law is even worse than having one legal regime covering the ocean leg, and another the inland leg, of a multimodal shipment. Because of an entrenched Circuit split, the law within the inland portion of the shipment changes as the container moves from circuit to circuit.

At the present time, the Fourth, Sixth, Seventh, and Eleventh Circuits do not apply the Carmack Amendment to the inland leg of a multimodal shipment. K-Line Pet. 11, 13-15. Cargo moving through those circuits would honor the contractual extension of COGSA. By contrast, the Second and Ninth Circuits do apply Carmack to the inland leg of a multimodal shipment and thus do not honor a contractual extension of COGSA (unless Carmack's strict requirements are satisfied). K-Line Pet. 11, 15-16. The complications can be illustrated by hypothetical cargo moving under a through bill of lading that incorporated COGSA from Yokohama, Japan via Tacoma, Washington and road and rail transportation to Albany, New York. While being shipped from Yokohama to Tacoma, the cargo would be governed by COGSA. After the cargo arrives in Tacoma and begins to move in the Ninth Circuit, it would be governed by Carmack. As cargo moved through Illinois and Indiana in the Seventh Circuit, it would be governed by COGSA. It would be governed by COGSA as the

cargo traveled through Ohio in the Sixth Circuit, and by Carmack when it reached New York in the Second Circuit.

It is difficult to imagine a legal regime more anathema to the uniformity and predictability that is so important for insurance carriers and for international commerce. A decision by this Court is necessary to unify the law governing international multimodal carriage in all the Circuits of this country.

SUMMARY OF ARGUMENT

A review of Carmack and its various recodifications shows that Carmack simply does not govern the carriage of cargo between a non-adjacent foreign country and a place in the United States. Carmack does govern carriage between an adjacent foreign country, Mexico or Canada, and a place in the United States. A significant amount of goods are carried over land between the U.S. and Mexico or Canada.[8] Application of the Carmack Amendment to that solely land carriage, either by train or truck, provides a uniform law to that entire land carriage no matter where during the inland carriage loss or damage occurs. By contrast, applying Carmack to the

[8] Of the 25 million container entries into the U.S. in 2007, over 14 million entered the nation by truck and rail from Canada and Mexico. U.S. DEP'T OF TRANSP., BUREAU OF TRANSP. STATISTICS at 21.

inland leg of a multimodal shipment from a non-adjacent country creates disuniformity and unpredictability; it is not what Congress intended.

This Court emphasized in several places in the opinion of *Norfolk Southern Ry. Co. v. James N. Kirby Pty Ltd.*, 543 U.S. 14, 28 (2004) that uniformity of law is crucial to multimodal transportation. In addition, the United States through its Delegation to the United Nations Commission on International Trade Law (UNCITRAL) Working Group III on Transport Law that drafted the Rotterdam Rules,[9] emphasized the need for one law to govern as far as possible each multimodal carriage. The decision below is in tension both with *Kirby* and the position of the United States.

ARGUMENT

I. THE CARMACK AMENDMENT DOES NOT GOVERN CARRIAGE BETWEEN A NON-ADJACENT FOREIGN COUNTRY AND A PLACE IN THE UNITED STATES.

The plain text of the Carmack Amendment before the 1978 recodification clearly applied only to

[9] U.N. Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, Dec. 11, 2008 General Assembly Resolution 63/122, Annex, U.N. Doc. A/RES/63/122. After a signing ceremony in Rotterdam in September 2009, this Convention will be known as the "Rotterdam Rules."

carriage from a place in the United States to a place in an adjacent foreign country, not to a place in a non-adjacent foreign country.[10]

Consistent with the plain text of the statute, this Court made clear before the 1978 recodification that the Carmack Amendment did not apply to carriage (or a shipment) between a non-adjacent foreign country and the United States. Justice Brandeis emphasized in 1920 that the Interstate Commerce Act governed carriage of cargo with *adjacent* foreign countries:

> The contention is that § 1 of the Act [to Regulate Commerce, February 4, 1887, c.

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[10] Any common carrier, railroad, or transportation company subject to the provisions of this chapter receiving property for transportation from a point in one State or Territory or the District of Columbia to a point in another State, Territory, District of Columbia, or *from* any point in the United States *to* a point in an *adjacent* foreign country shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, and no contract, receipt, rule, regulation, or other limitation of any character whatsoever shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed . . .

49 U.S.C. § 20(11) (1976) (emphasis added). Pet. App. 98a.

> 104, 24 Stat. 379] does not apply to the transportation of passengers from a foreign country to a point in the United States. To this there are two answers. The first is that the transportation here in question is not that of a passenger but of property. The second is that the act does apply to the transportation of both passengers and property from an *adjacent* foreign country, such as Canada. Section 1 declares that the act applies to "any common carrier . . . engaged in the transportation of passengers or property . . . from any place in the United States to an adjacent foreign country."

Galveston, Harrisburg & San Antonio Ry. Co. v. Woodbury, 254 U.S. 357, 359 (1920) (emphasis in original) (citation omitted). This Court also explained this same application of the Carmack Amendment to the Interstate Commerce Act, in *dicta*, in *Reider v. Thompson*, 339 U.S. 113 (1950). In *Reider*, a shipment of wool and skins was carried from Buenos Aires, Argentina to New Orleans, Louisiana, by ship pursuant to a bill of lading that described the carriage from Buenos Aires to New Orleans. At New Orleans, a separate bill of lading was issued by the railroad to evidence carriage from New Orleans to Boston. *Id.* at 116. This Court held that the carriage from New Orleans to Boston was governed by the Carmack Amendment. *Id.* at 117.

It was argued that the Carmack Amendment did not apply because the cargo originated in a non-adjacent foreign country. This Court responded as follows to that argument:

> Does the fact that the shipment in this case originated in a foreign country take it without the Carmack Amendment? We think not. There was no through bill of lading from Buenos Aires to Boston. The record does not show the slightest privity between respondent and the ocean carrier. The contract for ocean transportation terminated at New Orleans. Having terminated, nothing of it remained for the new, separate, and distinct domestic contract of carriage to "supplement." Even the parties to the ocean bill of lading and the domestic bill of lading were different. If the various parties dealing with this shipment separated the carriage into distinct portions by their contracts, it is not for courts judicially to meld the portions into something they are not. The test is not where the shipment originated, but where the obligation of the carrier as receiving carrier originated.

Id. See also K-Line Pet. at 19 nn. 3-5 (citing additional support).

Reider v. Thompson left us with the clear and rational rule that the Carmack Amendment's jurisdiction was limited to carriage from one state or territory of the United States to another (New Orleans, Louisiana to Boston, Massachusetts), or between an adjacent foreign country and a place in the United States. Its scope simply did not extend to cover carriage of cargo from a non-adjacent foreign country to the United States. If the parties had treated the carriage from Buenos Aires to Boston as

one move and evidenced that one move with one bill of lading, issued perhaps by an ocean carrier that had subcontracted the New Orleans to Boston leg to a railroad, no part of that one move would have been within Carmack's jurisdiction. The move would have been between Buenos Aires, a place in a non-adjacent foreign country, and Boston, a place in the United States.

When Congress recodified Carmack in 1978, it deleted 49 U.S.C. § 20(11), which had clearly limited the liability imposed by Carmack to carriage with adjacent countries.

The removal of the word "adjacent" from its prominent place in 49 U.S.C. § 20(11) has been misconstrued by some courts as affecting a substantive change in the law,[11] even though the introduction to the recodification act reads as follows:

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[11] The following relatively recent cases have applied the Carmack Amendment to multimodal carriage from or to non-adjacent foreign countries: *Mitsui Sumitomo Ins. Co. Ltd. v. Evergreen Marine Corp.*, No. 07 CV 3784 (CM), 2008 WL 4369763 (S.D.N.Y. Sept. 22, 2008); *Sompo Japan Ins. Co. v. Union Pacific R.R. Co.*, No. 03 CV 1604 (CM), 2007 WL 2230091 (S.D.N.Y. Aug. 2, 2007); *Sompo Japan Ins. Co. v. Yang Ming Marine Transp. Corp.*, No. 07 CV 11276 (DC), 2008 WL 4330058 (S.D.N.Y. Sept. 24, 2008); *Sompo Japan Ins. Co. of America v. Norfolk Southern Ry. C* , 540 F. Supp. 2d 486, *motion for reconsideration denied*, 553 F. Supp. 2d 348 (S.D.N.Y. 2008); *Rexroth Hydraudyne B.V. v. Ocean World Lines, Inc.*, No. 06 CV 5549 (LAK), 2007 WL 541958 (S.D.N.Y. Feb. 14, 2007). Application of the introduction to the 1978 recodification, K-Line Pet. App. 90a, would probably have eliminated the need to litigate many of these cases or would at least have eliminated the need to litigate whether Carmack applied.

An Act

> To revise, codify, and enact *without substantive change* the Interstate Commerce Act and related laws as subtitle IV of title 49, United States Code, "Transportation"
>
> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled* That certain general and permanent laws of the United States, related to transportation, are revised, codified, and enacted as title 49, United States Code, "Transportation" as follows: . . .

Pub. L. No. 95-473, 92 Stat. 1337 (1978) (first emphasis added); Pet. App. 90a. *See also* H.R. Rep. No. 95-1395, at 9 (1978), *reprinted in* 1978 U.S.C.C.A.N. 3009, 3018 (stating that the statute is intended to remain substantively unchanged and courts should not infer that a change of language is intended to change substance). This introduction is supported by Professor Michael F. Sturley's explanation of the intent of recodification:

> The purpose [of recodification] is to restate existing law to conform to "the understood policy, intent, and purpose of the Congress in the original enactments, with such amendments and corrections as will remove ambiguities, contradictions, and other imperfections both of substance and of form." 2 U.S.C. § 285(b)(1).

Michael F. Sturley, *Reflections on the Recodification of Title 46*, 2 BENEDICT'S MARITIME BULLETIN 209, 212

(2004).[12] Even though it is clear that Congress did not intend to change the substance of the Carmack Amendment, some courts have reasoned that because the word "adjacent" was not as prominent after the recodification as it had been in 49 U.S.C. § 20(11), Congress intended to and did greatly expand Carmack's application. It is obvious that if Congress had wished to change the substance in this drastic manner, it would not have said that it did not.[13]

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[12] Professor Sturley has also argued that there is no reason to distinguish *adjacent* foreign countries from non-adjacent foreign countries even though the distinction creates a substantive change, because "it seems wiser to follow the clear text of the statute rather than trace the prior language back over three decades and through two recodifications." Michael F. Sturley, *Maritime Cases About Train Wrecks: Applying Maritime Law to the Inland Damage of Ocean Cargo*, 40 J. MAR. L. & COM. 1, 34 (2009). On the contrary, it is widely accepted that when interpreting a recodification it should be presumed that the law is intended to remain substantively unchanged. *See Atchison, Topeka and Santa Fe Railway Co. v. U.S.*, 617 F.2d 485, 491 (7th Cir. 1980) ("Congress has unequivocally forbidden any interpretation that would substantively change the [Interstate Commerce Act]"); *U.S. v. Booky*, 733 F.2d 1335, 1337 n. 3 (9th Cir. 1984) (finding language present in original section of code, but absent in recodified section, must be read into recodified section when absence of language creates a substantive change); *Trailer Marine Transport Corp. v. Federal Maritime Comm.*, 602 F.2d 379, 383 n. 18 (D.C. Cir. 1979) (finding prohibition against substantive change in recodification of Interstate Commerce Act requires courts to closely examine language of the Act prior to recodification to determine intent of Congress).

[13] Indeed, even when Congress is silent as to its intent in revising and consolidating a statute, "it will not be inferred that Congress, in revising and consolidating the laws, intended to

(Continued on following page)

II. THE PRACTICAL RESULT OF THE DECISION OF THE LOWER COURT IN THIS MATTER IS OPPOSITE TO THE RESULT ACHIEVED BY THIS COURT IN *NORFOLK SOUTHERN RY. CO. V. JAMES N. KIRBY PTY LTD.*

This Court explained the advantages of uniform law governing multimodal carriage in *Norfolk Southern Ry. Co. v. James N. Kirby Pty Ltd.*, 543 U.S. 14 (2004).

Kirby presented multimodal carriage that was slightly more complicated than the carriage in this case. In *Kirby*, the shipper of cargo (Kirby) contracted with a Non-Vessel Operating Common Carrier (NVOCC) to carry cargo from Sydney, Australia to Huntsville, Alabama. The NVOCC contracted with a Vessel Operating Common Carrier (VOCC) also to carry the cargo from Sydney to Huntsville, Alabama. The VOCC contracted with a railroad (Norfolk Southern) to carry the cargo over land from the U.S. port of entry, Savannah, Georgia, to Huntsville, Alabama. The contract for the entire shipment was evidenced by the NVOCC through bill of lading issued to Kirby, and by the VOCC through bill of

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change their effect unless such intention is clearly expressed." *Fourco Glass Co. v. Transmirra Corp.*, 353 U.S. 222, 227 (1957) (quoting *Anderson v. Pacific Coast S.S. Co.*, 225 U.S. 187, 199 (1911)); *see also Sompo Japan Ins. Co. of America v. Union Pacific R.R. Co.*, 456 F.3d 54, 64 (2d Cir. 2006) (quoting *Fourco*); *In re Roll Form Prods., Inc.*, 662 F.2d 150, 153 & n. 5 (2d Cir. 1981).

lading issued by the VOCC to the NVOCC. *Kirby*, 543 U.S. at 19.

This Court held that the bill of lading was a maritime contract, and therefore, was governed by federal law. The Court stated:

> Confusion and inefficiency will inevitably result if more than one body of law governs a given contract's meaning. As we said in *Kossick*, when "a [maritime] contract . . . may well have been made anywhere in the world," it "should be judged by one law wherever it was made." Here, that one law is federal.

Id. at 29 (citing *Kossick v. United Fruit Co.*, 365 U.S. 731, 741 (1960)). This Court explained that the defenses and limitations in the NVOCC bill of lading protected all the parties that helped perform the multimodal carriage, including the railroad. The limitation contained in the VOCC bill of lading was lower than the NVOCC's bill of lading limitation and there was no direct contract between Kirby and the VOCC. This Court held that the NVOCC had acted as Kirby's limited agent to bind Kirby to the limitation contained in the VOCC's bill of lading. The lower limit was extended to the railroad by the Himalaya Clause[14] in the VOCC's bill of lading.

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[14] The term "Himalaya Clause" derives its name from the *S/S Himalaya*, which was involved in *Adler v. Dickson*, [1955] 1 Q.B. (C.A. 1954), and is used to describe provisions that extend maritime liability limitations. *See, e.g.*, *Kirby*, 543 U.S. at 20 n. 2 (1960).

The case at bar is simpler and no limited agency theory is necessary. The cargo shipper, Regal-Beloit Corporation, et al. contracted with Kawasaki Kisen Kaisha, Ltd. (K-Line) to carry cargo from China to various inland destinations in the United States. K-Line's U.S. agent, K-Line America, contracted with the Union Pacific Railroad Company (UPRR) for the inland carriage. K-Line Pet. App. at 9.

Kirby's reasoning applies a fortiori here: It suggests that K-Line's Himalaya Clause extended the terms of K-Line's contract, including a choice of forum clause, to the railroad. K-Line would of course be entitled to that choice of forum clause as well. *See Vimar Seguros Y Reasequros, S.A. v. M.V. Sky Reefer*, 515 U.S. 528, 541 (1995) (holding that foreign arbitration clauses in a bill of lading are valid under COGSA).

III. THE RESULT BELOW IS IN TENSION WITH THE WELL-REASONED POSITION OF THE UNITED STATES IN RECENT TREATY NEGOTIATIONS FOR THE ROTTERDAM RULES, WHICH IS THAT ONLY ONE LAW SHOULD GOVERN ALL ASPECTS OF INTERNATIONAL, MULTI-MODAL, DOOR-TO-DOOR CARRIAGE OF GOODS.

The United States played an active role in negotiating a Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, which was recently completed by the United

Nations Commission on International Trade Law (UNCITRAL) and approved on December 11, 2008 by the United Nations General Assembly.[15]

The United States proposed to the treaty drafters that the law governing the door-to-door carriage of goods should be as uniform as possible.[16] The United States stated its position as follows:

> I. Scope of application and performing parties . . .
>
> > 5. As part of the overall package, the United States supports a door-to-door regime on a uniform liability basis as between the contracting parties, subject to a limited network exception. This means that the contracting carrier's liability to the cargo interests would always be resolved under the Instrument's own substantive liability provisions (including the Instrument's own limitation and exoneration provisions) except when the network principle applies to supersede these provisions.

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[15] U.N. Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, Dec. 11, 2008 General Assembly Resolution 63/122, Annex, U.N. Doc. A/RES/63/122. After a signing ceremony in Rotterdam in September 2009, this Convention will be known as the "Rotterdam Rules."

[16] UNCITRAL, 12th Sess., Working Group III at 3, A/CN. 9/WG. III/WP 34 (Aug. 7, 2003) *available at* http://daccessdds.un.org/doc/UNDOC/LTD/V03/869/05/PDF/V0386905.pdf?OpenElement.

> To provide the maximum degree of uniformity possible, we would keep the network exception as narrow as possible. The narrow network exception contained in article 4.2.1 of the Draft Instrument would be acceptable to the United States.[17]

The network exception referred to a desire by European Nations to have their road and rail conventions[18] govern damage or loss on European roads or rails.

While the U.N. Convention will govern a multimodal carrier's liability during U.S. inland carriage, it will not apply directly to the railroad or trucking company acting as subcontractor to the carrier. The United States indicated that the carrier's Himalaya Clause should preserve uniformity by applying the carrier's defenses to the railroad or motor carrier:

> With regard to other performing parties, the Instrument should not create new causes of action or preempt existing causes of action. For example, the liability of an inland carrier (e.g., a trucker or a railroad) should be based

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[17] *Id.*

[18] *See* Convention on the Contract for the International Carriage of Goods By Road (CMR), May 19, 1956, 399 U.N.T.S. 189; Appendix B to the Convention Concerning International Carriage by Rail (COTIF) of May 9, 1980, and Uniform Rules Concerning the Contract for International Carriage of Goods by Rail (CIM), 2 International Transport Treaties, V-213 (Wolters Kluwer, Supp. 1-10 Jan. 1986).

> on existing law. In some countries, this may be a regional unimodal convention. . . . In others, it may be a mandatory or nonmandatory domestic law governing inland carriage, or the generally applicable tort law. In some countries, cargo interests may not have a cause of action against inland performing parties. Preserving the status quo in this regard would, of course, preserve whatever rights an inland performing party may have under applicable national law to rely on a Himalaya clause to claim the benefit of the contracting carrier's rights under the Instrument. The Instrument should neither increase nor decrease these existing rights.[19]

Inland United States carriers should be able to rely on Himalaya Clauses in the bills of lading issued by multimodal carriers. To interpret Carmack contrary to the clear meaning and intent expressed by Congress in the 1978 Recodification bill would severely harm the uniformity sought by the United States in the future Rotterdam Rules, and would increase the expense of U.S. foreign trade. It is obviously far more efficient to govern multimodal carriage with one law rather than many. When the law changes with the geographical location of the cargo or with the mode of transportation, liability is neither uniform nor predictable. This is detrimental not only to insurers, but to international trade.

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[19] UNCITRAL, *supra*, note 16.

A decision of this Court is necessary to interpret the Carmack Amendment correctly and thus preserve uniformity in the law governing the multimodal carriage of cargo.

CONCLUSION

The petition for writ of certiorari should be granted.

Dated: New York, New York
July 20, 2009

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AMICUS CURIAE BRIEF

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Nos. 08-1553 & 08-1554

IN THE

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KAWASAKI KISEN KAISHA LTD., *et al.*,
Petitioners,

and

UNION PACIFIC RAILROAD COMPANY,
Petitioner.

v.

REGAL-BELOIT CORPORATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* THE WORLD SHIPPING COUNCIL IN SUPPORT OF PETITIONERS

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INTEREST OF THE WORLD SHIPPING COUNCIL

The World Shipping Council ("WSC") is a non-profit trade association of 29 companies that operate 36 international shipping lines.[1] WSC's members

[1] In accordance with the Court's Rule 37.6, WSC and its counsel certify that no counsel for a party authored this brief in whole or in part. WSC also hereby discloses that petitioner Kawasaki Kisen Kaisha Ltd. is a member of WSC. Because the

include the full spectrum of vessel-operating common carriers, offering containerized, roll-on/roll-off, and car carrier services. WSC's members together provide over ninety percent of the containerized ocean transportation that serves the United States import and export trades.

A substantial percentage of the containerized shipments handled by WSC's members are the sort of "through" or "intermodal" arrangements at issue in this case. These are shipments for which the ocean carrier takes responsibility for the transportation transaction from origin to destination, including an inland "leg" of the transportation in addition to the ocean "leg," and issues a single "through bill of lading" to the shipper (the entity that owns or controls the cargo[2]) setting forth the terms of that transportation. The ocean carrier then subcontracts – with the cargo owner's consent – with rail and/or motor carriers for the inland leg of the cargo movement.

As in the case for which petitioners seek review, the through bills of lading issued by WSC's members typically include clauses that specify that the Carriage of Goods By Sea Act, 46 U.S.C. § 30701 Note ("COGSA"), shall apply to both the inland and the ocean components of the transportation, and that the COGSA liability limitations shall extend to railroads and truckers hired by ocean carriers to provide the

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expense of preparing this brief was paid from WSC's general budget, petitioner Kawasaki Kisen Kaisha Ltd. contributed in proportion to its share of the organization's membership dues (approximately 3.9%). Pursuant to Court Rule 37.2(a), all parties have consented to the filing of this brief, and WSC provided timely advance notice of this filing to all counsel of record for the parties.

[2] *See* 46 U.S.C. § 40102(22).

land transportation portion of the move. Thus, a single and predictable liability rule covers the entire transportation contracted for by the ocean carrier, regardless of whether damage to the goods occurred on the ocean leg, on the inland leg, or at an undetermined point in the journey (which is commonly the case).[3]

Whether the Carmack Amendment, 49 U.S.C. § 11706, or COGSA governs cargo liability for the inland portion of through international ocean transportation is of great importance to WSC's members. Whether or not there is a cargo claim on any given shipment, the issue of which liability regime applies affects every shipment, because the differences in venue options, amount of liability, and duty of care between the two statutes influence pricing, insurance arrangements, and the extent to which carriers may choose to offer intermodal transportation. Given the amount of trade affected, the broad range of entities affected (ocean carriers, rail carriers, motor carriers, cargo interests both in the U.S. and overseas, and the insurers that each party in the supply chain retains), and given the split among and confusion within the lower courts, resolution of this case by the Court is exceptionally important to the efficient and predictable flow of U.S. international trade.

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[3] If a shipper wishes to arrange separately for the inland transportation of its goods with a truck or rail carrier and for ocean transportation with an ocean carrier, it is always free to do so. The facts of this case (and the many thousands of factually similar intermodal shipments) involve a shipper that for its own convenience chose to engage an ocean carrier to handle the "through" move, including the inland portion of the transportation, under the ocean carrier's single bill of lading.

REASONS FOR GRANTING THE WRIT

WSC agrees with the reasons presented by both petitioners in support of review. The circuit split involves most of the major maritime circuits, and there is virtually no possibility that the split will be resolved without the intervention of this Court. WSC files this brief as *amicus curiae* in order to highlight several practical implications of the current circuit split that were not fully developed in the petitions.

1. First, the amount of cargo potentially affected by the decision below is extensive. According to 2008 statistics compiled by the United States Maritime Administration, approximately fifty-five percent of all containerized U.S. import cargo enters the country through seaports located within the jurisdiction of the Ninth Circuit. *See* United States Maritime Administration, U.S. Waterborne Container Import by U.S. Customs Ports, available at http://www.marad.dot.gov/documents/Container_by_US_Customs_Ports.xls. However, because the venue provisions in the Carmack Amendment allow suit to be filed in the judicial district where the rail transportation began regardless of the location of the cargo loss, *see* 49 U.S.C. § 11706(d), the geographic scope of the ruling below is actually much greater than the footprint of the Ninth Circuit. Although a substantial amount of cargo arriving at ports on the U.S. west coast is delivered within the boundaries of the Ninth Circuit, an equally substantial amount continues inland to other judicial circuits throughout the country. Thus, a claim arising from a train wreck outside of Chicago might be brought in the U.S. District Court for the Central District of California and governed by Ninth Circuit law if the container was transferred from ocean vessel to rail in the Port of Long Beach, Cali-

fornia. That would be the case even though the accident occurred within the boundaries of the Seventh Circuit, a circuit that applies a rule contrary to the rule in the case for which review is sought. *See Capitol Converting Equip., Inc. v. LEP Transp., Inc.*, 965 F.2d 391 (7th Cir. 1992).

2. Second, and related to the broad geographic reach of the Ninth Circuit's decision, the combination of a pervasive circuit split and the unique venue provisions of the Carmack Amendment make it difficult to predict which liability regime might apply to any given shipment. That in turn makes it difficult for the shipper and the ocean carrier to negotiate price and liability terms for the transportation and difficult for both parties to manage their risk.

With respect to the lack of predictability caused by the circuit split, the Long Beach to Chicago example, in which the judicial circuits at the beginning and the end of the rail transportation employ different inland cargo liability rules for through international shipments, is probably the simplest. Because all international cargo arriving via west coast ports is potentially subject to the Carmack Amendment for the inland leg of the transportation under the decision below, parties might simply assume that injured shippers would sue in the courts within the Ninth Circuit, and plan accordingly. On the east coast, however, the issue is more complicated. Many ocean carriers, for example, operate vessels that call both in New York, New York, and in Norfolk, Virginia, on the same voyage. Cargo transferred from vessel to truck or rail in New York is subject to the Second Circuit rule, which is the same as the Ninth Circuit rule, *see Sompo Japan Ins. Co. of Am. v. Union Pac. R.R. Co.*, 456 F.3d 54 (2d Cir. 2006), while cargo transferred

from vessel to inland conveyance in Norfolk is subject to the contrary Fourth Circuit rule, *see Shao v. Link Cargo (Taiwan) Ltd.*, 986 F.2d 700 (4th Cir. 1993). Thus, cargo on the same ship may be subject to different liability regimes based solely on the port at which it is discharged.

One might argue that carriers could still plan for the differences based on the anticipated port of discharge. But weather, port congestion, sale of the cargo in transit, and changes in shipper plans can all affect the discharge port after the vessel has sailed and the paperwork is done, and thus any attempt to anticipate which rules might apply could be for naught.

A typical, single containership operated by an ocean carrier will carry thousands of containers, with different origins and destinations, with vessel ports of call subject to change for operational reasons, and with importers frequently changing the U.S. port of discharge and/or the U.S. point of destination for their goods after booking the transportation.[4] The idea of document clerks perusing maps of the United States judicial circuits to determine which inland liability regime might apply as they issue individual bills of lading, make routing decisions, or receive and process destination change orders from shippers is more than a little absurd. More directly, it is simply unacceptable in an area of commerce that is clearly governed by federal law, and in which uniformity, efficiency, and predictability are essential, for parties to have to guess as to what law will govern their activities. *See Norfolk So. Ry. Co. v. James N. Kirby, Pty Ltd.*, 543

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[4] The international liner shipping industry makes roughly 22,000 calls at ports in the United States each year.

U.S. 14, 29 (2004) ("Confusion and inefficiency will inevitably result if more than one body of law governs a given contract's meaning."). The situation is all the more unacceptable where affected parties have to guess between two federal statutes. There is only one federal government, and it should have only one rule with respect to its international commerce.

3. The Ninth Circuit held, by way of a strained and cursory analysis of statutory definitions, that "K" Line, the ocean common carrier that issued the through bill of lading, was a "rail carrier" subject to the jurisdiction of the Surface Transportation Board ("STB") and therefore to the liability regime of the Carmack Amendment. Pet. App. at 12a-13a. This is the first time that any federal appellate court has held that an international ocean common carrier regulated by the Federal Maritime Commission ("FMC") is a rail carrier subject to STB jurisdiction. The holding is wrong on its face for a number of reasons, including the fact that STB jurisdiction over water carriers is limited to carriers engaged in domestic (as opposed to international) transportation. *See* 49 U.S.C. § 13521. This aspect of the decision by itself warrants review because it will create regulatory and practical chaos if allowed to stand.[5] It also serves as a basis for the broader incorrect result below.

First, from a legal perspective, the Ninth Circuit has unwittingly created a conflict between the Interstate Commerce Act ("ICA") and the Shipping Act of

[5] An ocean carrier will subcontract for services from a variety of entities to effectuate delivery of cargo, including marine terminal operators, stevedores, trucking companies, and railroads. Subcontracting with such entities does not transform an ocean carrier into being such entities.

1984, as amended, codified at 46 U.S.C. § 40101 et seq. by P.L 109-304, 120 Stat. 1523. Under the ICA, the "jurisdiction of the Board over [] transportation by rail carriers . . . is exclusive." 49 U.S.C. § 10501(b). If ocean carriers are in fact rail carriers with respect to the inland legs of through moves for which they purchase services from railroads, then the Board's exclusive jurisdiction over those activities nullifies numerous provisions in the Shipping Act. FMC jurisdiction over the inland portions of through intermodal moves by international ocean carriers is referenced in the Shipping Act a minimum of seven times. *See, e.g.*, 46 U.S.C. §§ 40102(12), 40102(24), 40102(25), 40301(a)(1), 40501(a)(1), 40502(c), and 41105(4). The Ninth Circuit's unprecedented grant to the STB of *exclusive* jurisdiction over inland transportation under a through bill of lading issued by an international ocean carrier would negate the FMC's jurisdiction and upset a longstanding and clear delineation between the regulation of domestic water carriers and the regulation of international ocean carriers.

In addition to creating yet another conflict between two federal laws regulating transportation (the ICA and the Shipping Act[6]), the Ninth Circuit's ruling that ocean carriers that subcontract with rail carriers

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[6] Contrary to a statement made in passing in one of the petitions, the FMC has no role in implementing COGSA. It has, in fact, expressly disclaimed any such authority. *See Definition of "Package" Under the Carriage of Goods by Sea Act*, 23 Shipping Reg. Rep. (P&F) 111, 113 (Fed. Maritime Comm'n 1985) (holding that COGSA is "a separate body of law governing shipowner rights and obligations which is subject only to court interpretation. . . ."). Thus, the additional conflict between federal statutes (the ICA and the Shipping Act) created by the decision below is separate from the COGSA/Carmack tension.

are themselves rail carriers creates a serious practical problem. Specifically, the decision below would allow Carmack's liability provisions to be altered by contract only if the ocean carrier, acting as the "rail carrier," first offered full Carmack terms to its shipper customer. *See* Pet. App. at 28a-29a. The problem with the suggestion is that the ocean carrier is able to offer through transportation to its customers because it has *already* negotiated a volume rate with the rail carrier in the United States (usually as part of a multi-year contract covering thousands of container shipments) – at a rate that assumes COGSA liability provisions that do not vary with each particular shipment. Requiring that current efficient system to be replaced by one in which the ocean carrier must ascertain the value of the goods in each of the thousands of containers on each vessel and then negotiate with the shipper and the rail carrier separately and in advance with respect to each shipment would cripple the ability of ocean carriers to provide predictable, through intermodal services to their customers.

In addition to imposing substantial transaction costs and delays, the fact is that such a system would simply be impossible to operate in many major ports. That is the case because many major ports are served by more than one railroad and hundreds of different trucking firms, and the ocean carrier may not know until the cargo is on the water (or after it has been discharged from the ship) which of its rail or trucking suppliers it will use for any given shipment. Further, an ocean carrier may substitute rail for truck or truck for rail in completing the inland portion of the through movement under a variety of circumstances. Such scenarios make advance liability discussions with shippers impossible. In short, the Ninth Cir-

cuit's proposed work-around for the problems that its incorrectly reasoned decision has created will not work, resulting in a loss of the very certainty, predictability, and efficiency that both COGSA and Carmack were designed to ensure.

CONCLUSION

The decision below, along with the recent Second Circuit decision in *Sompo*, improperly extends a domestic transportation scheme to international transportation, creates an unnecessary and unresolvable conflict between the Shipping Act and the Interstate Commerce Act, renders unworkable the flexible contracting provisions in the Shipping Act, the ICA, and COGSA, and threatens the ability of international ocean common carriers to provide predictable, efficient intermodal transportation services to their customers under a single bill of lading. The law neither requires nor allows those outcomes, and the Court should grant the writ and reverse.

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JOINT APPENDIX

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Exhibit B, Master Intermodal Transporation Agreement (June 1, 2003) (excerpts) JA-123

Combined Transport Bill of Lading B/L No. KKLUSH7807066, Exhibit A to Declaration of Jiang Jia Ying in Support of Defendants Kawasaki Kisen Kaisha, Ltd.'s and "K" Line America, Inc.'s Motion to Dismiss Pursuant to the Tokyo District Corut Forum Selection Clause in the Bill of Lading, *Regal-Beloit Corp. v. Kawasaki Kisen Kaisha Ltd.*, No. 05-3016 (C.D. Cal. Aug. 24, 2008) [Docket No. 50; ER 50] JA-137

Combined Transport Bill of Lading B/L No. KKLUSH7807068 , Exhibit B to Declaration of Jiang Jia Ying in Support of Defendants Kawasaki Kisen Kaisha, Ltd.'s and "K" Line America, Inc.'s Motion to Dismiss Pursuant to the Tokyo District Corut Forum Selection Clause in the Bill of Lading, *Regal-Beloit Corp. v. Kawasaki Kisen Kaisha Ltd.*, No. 05-3016 (C.D. Cal. Aug. 24, 2008) [Docket No. 50; ER 50] JA-148

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Combined Transport Bill of Lading B/L No. KKLU826146965, Exihibit to Declaration of Thomas Kwok in Support of Defendants Kawasaki Kisen Kaisha, Ltd.'s and "K" Line America, Inc.'s Motion to Dismiss Pursuant to the Tokyo District Corut Forum Selection Clause in the Bill of Lading, *Regal-Beloit Corp. v. Kawasaki Kisen Kaisha Ltd.*, No. 05-3016 (C.D. Cal. Aug. 24, 2008) [Docket No. 51; ER 51] JA-160

Combined Transport Bill of Lading B/L Nos. KKLUZG6400686, GDZY055302010, Exhibit to Declaration of Hua Gui Xing in Support of Defendants Kawasaki Kisen Kaisha, Ltd.'s and "K" Line America, Inc.'s Motion to Dismiss Pursuant to the Tokyo District Corut Forum Selection Clause in the Bill of Lading, *Regal-Beloit Corp. v. Kawasaki Kisen Kaisha Ltd.*, No. 05-3016 (C.D. Cal. Aug. 24, 2008) [Docket No. 52; ER 52] JA-172

"K" Line Service Contract - SCNo. 13933, Exhibit 5 to Deicaration of Dennis A. Cammarano in Opposition to Defendants' Motion to Dismiss/Transfer; Exhibits (C.D. Cal. Sept. 5, 2008) [Docket No. 60; ER 60] JA-183

ITEMS PREVIOUSLY REPRODUCED

In accordance with Supreme Court Rule 26.1, the following items have been omitted in printing this joint appendix because they appear on the following pages of the Appendices to Petitions for Writ of Certiorari filed on June 18, 2009 by Petitioners in Case No. 08-1553 and Case No. 08-1554.

Regal-Beloit Corp. v. Kawasaki Kisen Kaisha Ltd.,
557 F.3d 985 (9th Cir. 2009) 1a

Regal-Beloit Corp. v. Kawasaki Kisen Kaisha Ltd.,
462 F. Supp. 2d 1098 (C.D. Cal. 2006) 36a

Carriage of Goods by Sea Act
46 U.S.C.A. §30701 Notes (2009) 48a

Interstate Commerce Act
49 U.S.C.A. §10501 (2009) 62a

49 U.S.C. §10502 (2000) 63a

49 U.S.C. §10709 (2000) 65a

The Carmack Amendment
49 U.S.C. §11706 (2000) 69a

49 U.S.C. §14706 (2000) 73a

The Staggers Rail Act
Pub. L. No. 96-448, §10713,
94 Stat 1895 (1980) 79a
Pub. L. No. 96-448, §10505,
94 Stat 1912 (1980) 85a

1978 Codification
Pub. L. No. 95-473, §11707 [Carmack],
92 Stat 1453 (1978) 86a

Pub. L. No. 95-473, §10501,
92 Stat 1359 (1978) 90a

Former ICA Jurisdictional Provision
49 U.S.C. §1(1) (1976) 92a

Former Versions of the Carmack Amendment
An Act to Regulate Commerce, ch. 3591, 34
Stat. 593 (1906) 93a

Interstate Commerce Act Amendment,
ch. 176, 38 Stat. 1196 (1915) 95a

49 U.S.C. §20(11) (1976) 98a

Motor Carrier Act of 1935
Interstate Commerce Act Amendment,
ch. 498, 49 Stat. 543 (1935) 102a

STB Regulation Exempting Intermodal Transportation
49 C.F.R. §1090.2 ..... 104a

FMC regulations
46 C.F.R. §520.1(a) 105a

46 C.F.R. §520.2 ..... 106a

Master Intermodal Transportation Agreement ("MITA") dated June 1, 2003 (excerpts) 116a

RELEVANT DOCKET ENTRIES

U.S. Court of Appeals for the Ninth Circuit

Regal-Beloit Corp. v. Kawasaki Kisen Kaish
Case No. 06-56831

Date Filed	#	Docket Text
		* * *
12/22/2006	1	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT (Y/N): N. Setting schedule as follows: appellant's designation of RT is due 12/22/06; appellee's designation of RT is due 1/2/07; appellant shall order transcript by 1/11/07; court reporter shall file transcript in DC by 4/11/07; certificate of record shall be filed by 4/18/07; appellant's opening brief is due 5/29/07; appellees' brief is due 6/28/07; appellants' reply brief is due 7/12/07; [06-56831] (PG)
12/22/2006	2	Filed attorney for Appellant Civil Appeals Docketing Statement served on 12/12/06 (to CONFATT) [06-56831] [06-56831] (PG)
04/18/2007	3	Filed certificate of record on appeal RT filed in DC 1/12/07. [06-56831] (BG)

* * *

07/06/2007	9	Notice received from Appellee Union Pacific Rail titled: "Statement of the Union Pacific Railroad Company as to why Oral Argument should be granted in this matter." (NAN) (BJB)

* * *

08/29/2007	14	Filed original and 15 copies Appellee Union Pacific Rail brief, 60 pages, 1 Exc. vols: served on 8/27/07 minor defcy: no stmt of rel cases Notified counsel. [06-56831] record on appeal due 9/17/07; (BJB)
08/30/2007	15	Filed original and 15 copies appellee Kawasaki Kisen Kaish, K-Line America, Inc., Union Pacific Rail's 59 pages brief, 5 Exc. vols; served on 8/29/07 [06-56831] (BJB)
09/10/2007	18	Filed Union Pacific Rail notice of and motion for joinder and adoption by reference of portions of co-aples' brief [6279430-1] served on 9/7/07 (NAN) [6285272] (BJB)

* * *

09/12/2007	20	Filed Appellant Regal-Beloit Corp., Appellant Victory Fireworks, Appellant PICC Property, Appellant Royal & Sun

		Alliance response opposing appellee's motion for joinder [6285272-1] served on 9/11/07 (PROMO) [06-56831] (BJB)
09/17/2007	21	Filed Appellee Union Pacific Railroad reply to response to supporting appellee's motion for joinder [6285272-1] ; served on 9/11/07 (PROMO) [06-56831] (MF)
10/01/2007	22	Filed order (Deputy Clerk: lkk) Aplts' opposed notice of joinder in aple Union Pacific Railroad's in co-aple's answering brf and any related filing shall be referred to the panel that shall decide the merits of the case. [6285272-1] [06-56831] (BJB)
10/17/2007	24	Filed original and 15 copies Aplts' reply brief, (Informal: No) 33 pages; served on 10/15/07 [06-56831] (KKW)

* * *

06/03/2008	38	Filed aplts additional citations. Served on 05/27/2008. (panel) (CW)
06/03/2008	39	Filed Appellee Union Pacific Railroad Company opposition to aplts 5/27/07 28j ltr. Served on 06/02/2008. (CW)
06/05/2008	40	Filed Appellees K-Line America, Inc. and Kawasaki Kisen Kaisha Ltd. opposition to aplts 5/27/08 28j ltr. Served on 06/04/2008.

		(CW)
06/05/2008	41	Filed order (STEPHEN S. TROTT, SIDNEY R. THOMAS and RAYMOND C. FISHER) Appellee Union Pacific Railroad's motion for joinder and adoption by reference of portions of co-appellees' brief, filed September 10, 2007, is GRANTED. (BJB)
06/10/2008	42	ARGUED AND SUBMITTED TO STEPHEN S. TROTT, SIDNEY R. THOMAS and RAYMOND C. FISHER. (BG)
08/21/2008	43	Filed Appellee Union Pacific Railroad Company additional citations. Served on 08/20/2008. (fedex panel) (CW)
08/25/2008	44	Received aplts FRAP 34 notice, copy of amended memo and order in support of aplts argument. (CW)
08/28/2008	45	Filed Appellees K-Line America, Inc. and Kawasaki Kisen Kaisha Ltd. additional citations. Served on 08/27/2008. (faxed to panel) (RL)
08/28/2008	46	Filed Appellees K-Line America, Inc. and Kawasaki Kisen Kaisha Ltd. additional citations. Served on 08/27/2008. (faxed to panel) (RL)
09/02/2008	47	Received Appellee Union Pacific Railroad Company RESPONSE to Aplt's additional citations,

		served on 8/29/08. (faxed to panel) (LN)
09/02/2008	48	Filed Appellee Union Pacific Railroad Company opposition to aplts 8/21/08 addl citation. Served on 08/29/2008. (CW)
09/26/2008	49	Filed aplts additional citations. Served on 09/25/2008. (panel) (CW)
10/06/2008	50	Filed Appellee Union Pacific Railroad Company response to aplts 28j letter. Served on 10/03/2008. (panel) (CW)
11/10/2008	51	Filed additional citations. Served on 11/07/2008. (panel) (CW)
01/29/2009	52	Filed Appellees K-Line America, Inc. and Kawasaki Kisen Kaisha Ltd. additional citations. Served on 01/28/2009. (panel) (CW)
02/04/2009	53	FILED OPINION (STEPHEN S. TROTT, SIDNEY R. THOMAS and RAYMOND C. FISHER) REVERSED AND REMANDED. Judge: RCF Authoring. FILED AND ENTERED JUDGMENT. (RP)
02/09/2009	54	Filed (ECF) Appellants PICC Property & Casualty Company Limited Shanghai Branch, Regal-Beloit Corporation, Royal & Sun Alliance Insurance Co. Ltd. and Victory Fireworks, Inc. bill of costs (Form 10) in the amount of 1,588.00 USD. Date of service:

		02/09/2009 [6802468] (DAC)
02/17/2009	55	Filed Order for PUBLICATION (STEPHEN S. TROTT, SIDNEY R. THOMAS and RAYMOND C. FISHER) The opinion filed February 4, 2009 is withdrawn. (RP)
02/17/2009	56	FILED OPINION (STEPHEN S. TROTT, SIDNEY R. THOMAS and RAYMOND C. FISHER) REVERSED AND REMANDED. Judge: RCF Authoring. FILED AND ENTERED JUDGMENT. (RP)
03/09/2009	57	Filed (ECF) Appellees K-Line America, Inc. and Kawasaki Kisen Kaisha Ltd. Motion to stay the mandate. Date of service: 03/09/2009. [6838160] (AN)
03/09/2009	58	Filed clerk order: Electronically-filed document [6838160-3] Motion (ECF Filing), [6838160-2] motion to stay the mandate is stricken because the document is scanned. (TB)
03/09/2009	59	Filed (ECF) Appellees K-Line America, Inc. and Kawasaki Kisen Kaisha Ltd. Motion to stay the mandate. Date of service: 03/09/2009. [6838723] (AN)
03/09/2009	60	Filed (ECF) Appellee Union Pacific Railroad Company Motion to stay the mandate. Date of service: 03/09/2009. [6838767]

		(LGM)
03/18/2009	61	Filed order (STEPHEN S. TROTT, SIDNEY R. THOMAS and RAYMOND C. FISHER) Appellees Kawasaki Kisen Kaisha, Ltd. and K-Line America, Inc.'s motion for stay of mandate pending filing of a petition for a writ of certiorari, filed March 9, 2009, is DENIED without prejudice to requesting a stay from the district court. Appellee Union Pacific Railroad Co.'s motion for stay of mandate pending filing of a petition for a writ of certiorari, filed March 9, 2009, is DENIED without prejudice to requesting a stay from the district court. (BJB)
03/25/2009	62	MANDATE ISSUED.(SST, SRT and RCF) (TB)
03/30/2009	63	AMENDED MANDATE ISSUED (to reflect correct date of judgment and award cost) SST, SRT and RCF. Cost awarded to Appellants in the amount of $1588.00. (TB)
04/23/2009	64	Received letter from the Supreme Court dated 04/20/2009 regarding extension of time within which to file a petition for a writ of cert has been extended to 6/18/09. (SW)
06/23/2009	65	Received notice from the

Supreme Court: petition for certiorari filed on 06/18/2009. Supreme Court Number 08-1553. [6969697] (TB)

U.S. District Court for the Central District of California

Regal-Beloit Corp. v. Kawasaki Kisen Kaisha Ltd.
Case No. 2:06-cv-03016-DSF-FMO

Date Filed	#	Docket Text
05/17/2006	1	NOTICE OF REMOVAL from Los Angeles County Superior Court; South District, case number NC038310 with copy of summons and complaint. Case assigned to Judge Dale S. Fischer, Discovery to Magistrate Judge Fernando M Olguin. (Filing fee $350) filed by defendant Union Pacific Railroad Company.(jag) (Entered: 05/25/2006)
		* * *
05/17/2006	3	JOINDER filed by Defendants Kawasaki Kisen Kaisha Ltd, K-Line America Inc joining in Notice of Removal 1 (jag,) (Entered: 05/25/2006)
05/17/2006	4	DEMAND for Jury Trial filed by defendant Union Pacific Railroad Company. (jag) (Entered: 05/25/2006)
		* * *
05/24/2006	9	ANSWER to Notice of Removal, 1 filed by defendant Union Pacific Railroad Company.(mg,) (Entered: 05/26/2006)

05/24/2006	10	CROSSCLAIM against cross-defendants Kawasaki Kisen Kaisha Ltd, K-Line America Inc, and ROES 1 through 5; filed by defendant / cross-complainant Union Pacific Railroad Company.(mg) (Entered: 05/26/2006)

* * *

05/26/2006	13	THIRD PARTY COMPLAINT filed by defendant Union Pacific Railroad Company against third party defendants CMT International Inc, Container Transportation Co Ltd, Kunshan Yuanjin Plastic and Electronic Co Ltd, Plano Molding Company, Shanghai Haixing Yuanchang, Thi Group Ltd, World Commerce Services Inc, World Commerce Services LLC. Jury Demand. (mg,) (Entered: 05/31/2006)
05/26/2006	14	NOTICE of Related Case(s) filed by Defendant Union Pacific Railroad Company. Related Case(s): CV 06-3016 DSF (FMOx), CV 06-3017 AHM (MANx), CV 06-3018 R (RZx), CV 06-3019 SVW (CTx) (rn) (Entered: 05/31/2006)
05/31/2006	15	ANSWER to Notice of Removal, 1 filed by defendants Kawasaki Kisen Kaisha Ltd, K-Line

		America Inc.(mg) (Entered: 06/01/2006)
05/31/2006	16	CROSSCLAIM against cross-defendant Union Pacific Railroad Company filed by cross-defendants Kawasaki Kisen Kaisha Ltd, K-Line America Inc.(mg) (Entered: 06/01/2006)
		* * *
06/05/2006		20 Day Summons Issued re Third Party Complaint, 13 as to CMT International Inc, Container Transportation Co Ltd, Kunshan Yuanjin Plastic and Electronic Co Ltd, Plano Molding Company, Shanghai Haixing Yuanchang, Thi Group Ltd, World Commerce Services Inc, World Commerce Services LLC. (mg) (Entered: 06/06/2006)
		* * *
06/22/2006	19	ANSWER to Crossclaim 10 filed by cross-defendants' Kawasaki Kisen Kaisha Ltd, K-Line America Inc.(bp) (Entered: 06/28/2006)
		* * *
06/27/2006	27	SCHEDULE OF PRETRIAL AND TRIAL DATES filed by plaintiff Regal-Beloit Corporation. (mg,) (Entered: 07/07/2006)

* * *

07/05/2006	24	ORDER REGARDING JURY TRIAL by Judge Dale S. Fischer: I Order regarding Deadlines: A) Adding Parties or Amending Pleadings 12/3/2006. B) Discovery cut-off 10/3/2007; C) Expert Witness Exchange Deadline: Initial 11/3/07, Rebuttal 12/3/07, Cut-off 2/3/08; D) Motion hearing cut-off 4/3/08; Settlement Conference cut-off 4/17/08; Final Pretrial Conference 5/29/08 at 3:00; Trial date 6/12/08 at 8:00; II Order regarding Trial Preparation, III Order Governing Conduct of Attorneys and Parties (See document for further details) (ir) (Entered: 07/05/2006)
07/05/2006	25	ANSWER to Crossclaim of Kawasaki Kisen Kaisha Ltd and K-Line America Inc 16 filed by cross-defendant Union Pacific Railroad Company.(mg) (Entered: 07/06/2006)

* * *

08/08/2006	31	STIPULATION AND ORDER by Judge Dale S. Fischer that Case Nos. CV 06-3016, CV 06-3017, CV 06-3018 and CV 06-3019 are hereby consolidated before this Court for all purposes, that the Order re Jury Trial filed

		7/5/06 in Case CV 06-3016 shall apply and govern all consolidated cases, and further that the Scheduling Conference set for 8/14/06 at 11:00 am, in Case Nos. CV 06-3017, CV 06-3018 and CV 06-3019 shall be and is hereby ordered off-calendar. (mg) (Entered: 08/09/2006)
		* * *
08/18/2006	40	NOTICE OF MOTION AND MOTION to Transfer Case to Southern District of New York pursuant to 28 USC section 1404(a) filed by defendant Union Pacific Railroad Company. Motion set for hearing on 9/18/2006 at 01:30 PM before Judge Dale S. Fischer. Lodged proposed order. (mg) (Entered: 08/29/2006)
08/18/2006	41	DECLARATION of Terry Sheldon in support of Union Pacific Railroad Company's MOTION to Transfer Case to Southern District of New York 40 filed by defendant Union Pacific Railroad Company. (mg) (Entered: 08/29/2006)
08/18/2006	42	DECLARATION of Barry N Gutterman and Exhibits thereto in support of MOTION to Transfer Case to Southern District of New York 40 filed by

		defendant Union Pacific Railroad Company. (mg) (Entered: 08/29/2006)
08/18/2006	43	DECLARATION of Leslie G McMurray and Exhibits thereto in support of MOTION to Transfer Case to Southern District of New York 40 filed by defendant Union Pacific Railroad Company. (mg) (Entered: 08/29/2006)
08/24/2006	46	NOTICE OF MOTION AND MOTION to Dismiss the action pursuant to the Tokyo District Court forum selection clause in the bill of lading; filed by defendants Kawasaki Kisen Kaisha Ltd, K-Line America Inc. Motion set for hearing on 9/18/2006 at 01:30 PM before Judge Dale S. Fischer. Lodged proposed order. (mg) (Entered: 09/01/2006)
08/24/2006	47	MEMORANDUM OF POINTS AND AUTHORITIES in Support of defendants MOTION to Dismiss Case 46 filed by defendants/cross-defendants Kawasaki Kisen Kaisha Ltd, K-Line America Inc. (mg) (Entered: 09/01/2006)
08/24/2006	48	DECLARATION of Sherry Johnson in support of defendants MOTION to Dismiss Case 46 filed

		by defendants / cross-defendants Kawasaki Kisen Kaisha Ltd, K-Line America Inc. (mg) (Entered: 09/01/2006)
08/24/2006	49	EXHIBITS TO THE DECLARATION OF SHERRY JOHNSON IN SUPPORT OF MOTION to Dismiss Case 46 filed by defendants/cross-defendants Kawasaki Kisen Kaisha Ltd, K-Line America Inc. (mg) (Entered: 09/01/2006)
08/24/2006	50	DECLARATION of Jiang Jia Ying in support of defendants MOTION to Dismiss Case 46 filed by defendants / cross-defendants Kawasaki Kisen Kaisha Ltd, K-Line America Inc. (mg) (Entered: 09/01/2006)
08/24/2006	51	DECLARATION of Thomas Kwok in support of MOTION to Dismiss Case 46 filed by defendant Kawasaki Kisen Kaisha Ltd, K-Line America Inc. (mg) (Entered: 09/01/2006)
08/25/2006	52	DECLARATION of Hua Gui Xing in support of MOTION to Dismiss Case 46 filed by defendants / cross-defendants Kawasaki Kisen Kaisha Ltd, K-Line America Inc. (mg) (Entered: 09/01/2006)
08/25/2006	54	NOTICE OF JOINDER AND JOINDER in the K Line

		MOTION to Dismiss this Case based on the forum selection clause in the applicable K Line bills of lading 46 filed by defendant Union Pacific Railroad Company. Motion set for hearing on 9/18/2006 at 01:30 PM before Judge Dale S. Fischer. Lodged proposed order. (mg) (Entered: 09/05/2006)
08/25/2006	55	DECLARATION of Leslie G McMuray in support of Union Pacific Railroad Company's JOINDER in the K Line MOTION to Dismiss this Case based on the forum selection clause in the applicable K Line bills of lading 46 54 filed by defendant Union Pacific Railroad Company. (mg,) Modified on 9/5/2006 (mg) (Entered: 09/05/2006)
08/25/2006	56	DECLARATION of Terry D Sheldon in support of Union Pacific Railroad Company's Joinder in MOTION to Dismiss Case 46 54 filed by defendant Union Pacific Railroad Company. (mg) (Entered: 09/05/2006)
08/25/2006	57	FOREIGN AUTHORITIES in support of NOTICE OF JOINDER in MOTION to Dismiss Case 46 54 filed by defendant Union Pacific Railroad

		Company. (mg) (Entered: 09/05/2006)
		* * *
09/01/2006	58	OPPOSITION to MOTION to Transfer Case to Southern District of New York 40 filed by defendants Kawasaki Kisen Kaisha Ltd, K-Line America Inc. (mg) (Entered: 09/11/2006)
09/05/2006	59	OPPOSITION to Union Pacific Railroads Company's MOTION to Transfer Case to Southern District of New York 40 filed by plaintiff Regal-Beloit Corporation. (mg) (Entered: 09/12/2006)
09/05/2006	60	DECLARATION of Dennis A Cammarano in Opposition to defendants MOTION to Dismiss/Transfer 40 46 ; Exhibits; filed by plaintiff Regal-Beloit Corporation. (mg) Modified on 9/12/2006 (mg). (Entered: 09/12/2006)
09/05/2006	61	OPPOSITION to MOTION to Dismiss Case 46 filed by plaintiff Regal-Beloit Corporation. (mg) (Entered: 09/12/2006)
09/12/2006	63	NOTICE OF MOTION AND MOTION to Dismiss the third-party claims of Union Pacific Railroad filed by third party defendant CMT International Inc.

		Motion set for hearing on 10/16/2006 at 01:30 PM before Judge Dale S. Fischer. (yl) (Entered: 09/19/2006)
09/12/2006	64	MEMORANDUM OF POINTS AND AUTHORITIES In in Support of MOTION to Dismiss the third-party claims of Union Pacific Railroad 63 CMT International Inc. (yl) (Entered: 09/19/2006)
09/12/2006	65	REPLY TO THE OPPOSITION Of "K" Line and Kaim to UPRR's MOTION to Transfer Case to Southern District of New York 40 filed by Defendant Union Pacific Railroad Company. (yl) (Entered: 09/19/2006)
09/12/2006	66	REPLY TO THE OPPOSITION OF Plaintiff's MOTION to Transfer Case to Southern District of New York 40 filed by Defendant Union Pacific Railroad Company. (yl) (Entered: 09/19/2006)
09/12/2006	67	REPLY TO THE OPPOSITION OF UPRR's Joinder in the "K" Line Motion to Dismiss 46 46 54 filed by Defendant Union Pacific Railroad Company. (yl) (Entered: 09/19/2006)
09/12/2006	68	DECLARATION of HIROSHI KIMURA IN SUPPORT OF MOTION to Dismiss Case 46 filed

		by Defendants and Cross-Defendants Kawasaki Kisen Kaisha Ltd, K-Line America Inc. (yl) (Entered: 09/19/2006)
09/12/2006	69	DECLARATION of ALAN NAKAZAWA IN SUPPORT OF MOTION to Dismiss the third-party claims of Union Pacific Railroad 63 filed by Defendants and Cross-Defendants Kawasaki Kisen Kaisha Ltd and K-Line America Inc. (yl) (Entered: 09/19/2006)
09/12/2006	70	REPLY MEMORANDUM IN SUPPORT Of the MOTION to Dismiss Case 46 filed by Defendants Kawasaki Kisen Kaisha Ltd and K-Line America Inc. (yl) (Entered: 09/19/2006)

* * *

09/27/2006	75	MINUTES (IN CHAMBERS ORDER) held before Judge Dale S. Fischer: The Court declines to rule on defendants MOTION to Dismiss Case 46 , 54 until such time as they provide legible copies of the Bills of Lading. If legible copies are not provided by 10/10/06, the motion will be denied. The motion is taken off-calendar and under submission. Court Reporter: Not Present. (mg) (Entered: 09/27/2006)

09/29/2006	76	MINUTES (IN CHAMBERS ORDER) held before Judge Dale S. Fischer: Denying Defendant Union Pacific Railroad Company's MOTION to Transfer Venue 40 . Court Reporter: Not Present. (mg) (Entered: 09/29/2006)
10/02/2006	78	OPPOSITION to MOTION to Dismiss the third-party claims of Union Pacific Railroad 63 filed by Defendant Union Pacific Railroad Company. (mg) (Entered: 10/06/2006)
10/02/2006	79	DECLARATION of Leslie G McMurray and EXHIBITS thereto in Opposition to CMTS MOTION to Dismiss 63 filed by Defendant Union Pacific Railroad Company. (mg) (Entered: 10/06/2006)
10/02/2006	80	DECLARATION of Terry D Sheldon and EXHIBITS thereto in Opposition to MOTION to Dismiss 63 filed by Defendant Union Pacific Railroad Company. (mg) (Entered: 10/06/2006)
10/02/2006	81	OBJECTION to the Declaration of Monica Lien filed by Defendant Union Pacific Railroad Company. (mg) (Entered: 10/06/2006)

* * *

10/10/2006	86	MEMORANDUM IN OPPOSITION to Union Pacific

		Railroad Companys Objections to the Declaration of Monica Lien 81 filed by ThirdParty Defendant CMT International (mg,) (Entered: 10/20/2006)
10/10/2006	87	DECLARATION of Alan Nakazawa in support of Kawasaki Kisen Kaisha Ltds and K Line America Inc's MOTION to Dismiss 46 filed by Defendants / Cross-Defendants Kawasaki Kisen Kaisha Ltd, K-Line America Inc (mg,) (Entered: 10/20/2006)
10/10/2006	90	REPLY MEMORANDUM in Support of Third Party Defendant CMT International Inc's MOTION to Dismiss claims of Union Pacific Railroad 63 filed by Third Party Defendant Container Transportation Co Ltd. (mg,) (Entered: 10/25/2006)
10/11/2006	88	REPLY MEMORANDUM in support of MOTION to Dismiss the third-party claims of Union Pacific Railroad 63 filed by defendant CMT International Inc. (am,) (Entered: 10/24/2006)
		* * *
11/14/2006	104	ORDER by Judge Dale S. Fischer granting Defendants MOTION to Dismiss 46, 54, pursuant to the Tokyo District

		Court Forum Selection Clause in the bill of lading (mg,) Modified on 11/15/2006 (mg,). (Entered: 11/15/2006)
		* * *
12/12/2006	128	NOTICE OF APPEAL to 9th CCA filed by plaintiff Regal-Beloit Corporation, Victory Fireworks, Inc., PICC Property & Casualty Company Limited and Shanghai Haixing Yuanchang. Appeal of Order 104 Filed On: 11/14/06; Entered On: 11/15/06; Filing fee $455, paid, receipt number 91272. Forms given: Transcript Designation and Ordering form. cc: Dennis A. Cammarano; Alan Nakazawa; Leslie G. McMurray (dmap,) Modified on 12/15/2006 (dmap,). (Entered: 12/15/2006)
12/12/2006		Civil Appeals Docketing Statement received from plaintiff Regal-Beloit Corporation, Victory Fireworks, Inc., PICC Property & Casualty Company Limited, and Shanghai Haixing Yuanchang forwarded to 9th CCA. RE: Appeal to Circuit Court, 128 (dmap) (Entered: 12/15/2006)
12/15/2006		Transmission of Notice of Appeal and Docket Sheet to US Court of Appeals re: Appeal to Circuit Court, 128 (dmap,) (Entered:

		12/15/2006)
12/26/2006	130	TRANSCRIPT DESIGNATION AND ORDERING FORM For Dates: 07/03/06 and 11/27/06; Court Reporter: Pamela Seijas; Court of Appeals Case Number: Not yet designated; Re: Appeal to Circuit Court 128 (et) (Entered: 12/27/2006)
12/27/2006	129	NOTIFICATION by Circuit Court of Appellate Docket Number 06-56831, 9th CCA regarding Appeal to Circuit Court, 128 filed by Regal-Beloit Corporation, Shanghai Haixing Yuanchang. (et) (Entered: 12/27/2006)
01/12/2007	131	TRANSCRIPT filed for proceedings held on 7/3/2006. Court Reporter: Pamela A. Seijas. (tad,) (Entered: 01/17/2007)
01/12/2007	132	TRANSCRIPT filed for proceedings held on 11/27/2006. Court Reporter: Pamela A. Seijas. (tad,) (Entered: 01/17/2007)
04/16/2007	133	CERTIFICATE OF RECORD Transmitted to USCA re Appeal to Circuit Court, 128 filed by Regal-Beloit Corporation, Shanghai Haixing Yuanchang, ; Court of Appeals Case Number: 06-56831; (car,) (Entered:

04/16/2007)

* * *

08/15/2007	137	STIPULATION to Stay Further Proceedings in the District Court Pending the Appeal and Order: The Court, having reviewed the above stated stipulation of the remaining parties which have made an appearance in this case and which have not been dismissed, and good cause appearing therefore, grants the request of the parties, vacates all pending dates, and places a STAY on discovery herein pending resolution of the appeal of the Ninth Circuit of this court's dismissal of plaintiffs claims in the four above captioned consolidated cases. IT IS SO ORDERED by Judge Dale S. Fischer. (jp) (Entered: 08/16/2007)

* * *

04/04/2008	139	RECORD ON APPEAL sent to Circuit Court re: Appeal number, 06-56831; Record consists of 7 volumes, 2 transcripts re Notice of Appeal to 9th Circuit Court of Appeals, 128 (dmap) (Entered: 04/07/2008)
02/17/2009	140	ORDER from 9th CCA filed re: Notice of Appeal to 9th Circuit Court of Appeals, 128 filed by Shanghai Haixing Yuanchang,

		Regal-Beloit Corporation, CCA # 06-56831. The opinion filed February 4, 2009 is withdrawn. Order received in this district on 2/17/09. (lr) (Entered: 02/19/2009)
03/18/2009	141	ORDER from 9th CCA filed, CCA # 06-56831. The Order received in this district on 3/18/2009. Appellees Kawasaki Kisen Kaisher Ltd. and K-Line America Inc. and Union Pacific Railroad Co's motion for stay of mandate pending filing of a petitioner for writ of certiorari, filed 3-9-2009 are DENIED without prejudice to requesting a stay from the district court. (lra) (Entered: 03/20/2009)
03/25/2009	142	MANDATE of 9th CCA filed re: Notice of Appeal to 9th Circuit Court of Appeals, 128, CCA # 06-56831. The Judgment of the district court is Reversed and Remanded. Mandate received in this district on 3/25/09. (car) (Entered: 03/26/2009)
		* * *
03/31/2009	143	AMENDED MANDATE of 9th CCA filed re: Notice of Appeal to 9th Circuit Court of Appeals, 128 , CCA # 06-56831. The judgment of the district court is Reversed and Remanded. Cost awarded to Appellant in the amount of

		$1588.00. Amended Mandate received in this district on 3/31/09. (car) (Additional attachment(s) added on 4/6/2009: # 1 Bill of cost in the amount of $1,588.00) (dmap). (Entered: 04/01/2009)
04/20/2009	145	NOTICE OF MOTION AND MOTION to Stay Case pending U.S. Supreme Court ruling on UP's Petition for Writ of Certiorari and if granted, during UP's Appeal to the U.S. Supreme Court filed by Defendant Union Pacific Railroad Company. Motion set for hearing on 6/1/2009 at 01:30 PM before Judge Dale S. Fischer. (Attachments: # 1 Declaration of Leslie G. McMurray in Support of Motion to Stay)(McMurray, Leslie) (Entered: 04/20/2009)
		* * *
05/01/2009	148	NOTICE OF MOTION AND MOTION to Stay Case pending Filing of Petition for Writ of Certiorari and Ruling Upon Case by U.S. Supreme Court filed by Defendant Kawasaki Kisen Kaisha Ltd, K-Line America Inc's Motion set for hearing on 6/1/2009 at 01:30 PM before Judge Dale S. Fischer. (Attachments: # 1 Declaration by Alan Nakazawa in Support of Motion by Defendants

Kawasaki Kisen Kaisha, Ltd. and "K" Line America, Inc. For a Stay of Proceedings Pending Filing of Petition for Writ of Certiorari and Ruling Upon Case by U.S. Supreme Court, # 2 Exhibit A, # 3 Exhibit B, # 4 Proposed Order Granting Motion by Defendants Kawasaki Kisen Kaisha, Ltd. and "K" Line America, Inc. For a Stay of Proceedings Pending Filing of Petition for Writ of Certiorari and Ruling Upon Case by U.S. Supreme Court, # 5 Proof of Service) (Nakazawa, Alan) (Entered: 05/01/2009)

05/04/2009 149 NOTICE OF MOTION AND Amended MOTION to Stay Case pending Petition for Certiorari and Review by Supreme Court filed by Defendant Union Pacific Railroad Company. Motion set for hearing on 6/1/2009 at 01:30 PM before Judge Dale S. Fischer. (Attachments: # 1 Declaration of Leslie G. McMurray)(McMurray, Leslie) (Entered: 05/04/2009)

* * *

05/18/2009 151 OPPOSITION re: Amended MOTION to Stay Case pending Petition for Certiorari and Review by Supreme Court 149 filed by Plaintiff Regal-Beloit

		Corporation. (Attachments: # 1 Declaration of Susan M. Hutchison in Opposition to UP's Amended Motion to Stay the Proceedings in the District Court Pending a Ruling on its Petition for Certiorari to the United States Supreme Court and Its Appeal to that Court)(Cammarano, Dennis) (Entered: 05/18/2009)
05/18/2009	152	Plaintiff's Opposition to Kawasaki Kisen Kaisha, Ltd. and K-Line America, Inc.'s Motion to Stay the Proceedings in the District Court Pending a Ruling on Its Petition for Certiorari to the United States Supreme Court and Its Appeal to that Court Opposition re: MOTION to Stay Case pending Filing of Petition for Writ of Certiorari and Ruling Upon Case by U.S. Supreme Court 148 filed by Plaintiff Regal-Beloit Corporation. (Attachments: # 1 Declaration of Susan M. Hutchison in Opposition to Kawasaki Kisen Kaisha, Ltd.; K-Line America, Inc.'s Motion to Stay the Proceedings in the District Court Pending a Ruling on Its Petition for Certiorari to the United States Supreme Court and Its Appeal to that

		Court)(Cammarano, Dennis) (Entered: 05/18/2009)
05/22/2009	153	REPLY *to Plaintiffs' Opposition to Motion by Defendants Kawasaki Kisen Kaisha, Ltd. and "K" Line America, Inc. for a Stay of Proceedings* filed by Cross Defendants Kawasaki Kisen Kaisha Ltd, K-Line America Inc, Defendants Kawasaki Kisen Kaisha Ltd, K-Line America Inc, Cross Claimants Kawasaki Kisen Kaisha Ltd, K-Line America Inc. (Attachments: # 1 Certificate of Service)(Nakazawa, Alan) (Entered: 05/22/2009)
05/22/2009	154	REPLY Support Amended MOTION to Stay Case pending Petition for Certiorari and Review by Supreme Court 149 filed by Defendant Union Pacific Railroad Company. (McMurray, Leslie) (Entered: 05/22/2009)
05/22/2009	155	MINUTES (IN CHAMBERS): by Judge Dale S. Fischer: granting 148 Motion to Stay Case; granting 149 Motion to Stay Case. This matter is back on remand from the Court of Appeals after a reversal of this Courts order dismissing the action for improper venue. Defendants now move to stay the case pending Supreme Court action on their

petitions for certiorari. The Court deems this matter appropriate for decision without oral argument. See Fed. R. Civ. P. 78; Local Rule 7-15. The hearing set for June 1, 2009, is removed from the Courts calendar. For the reasons stated in the moving and reply papers, the motions are granted on the condition that a timely petition for writ of certiorari is filed. This matter is stayed pending final disposition by the Supreme Court. The parties are to inform this Court of any order or opinion of the Supreme Court within two Court days. (shb) (Entered: 05/26/2009)

U.S. District Court for the Central District of California

Victory Fireworks Inc. v. Kawasaki Kisen Kaisha Ltd.
Case No. 2:06-cv-03017-DSF-FMO

Date Filed	#	Docket Text
05/17/2006	1	NOTICE OF REMOVAL from Los Angeles County Superior Court; South Division, case number NC038303 with copy of summons and complaint. Case assigned to Judge A. Howard Matz, Discovery to Magistrate Judge Margaret A Nagle. (Filing fee $350) filed by defendant Union Pacific Railroad Company.(jag) (Entered: 05/25/2006)
		* * *
05/26/2006	11	NOTICE of Related Case(s) filed by Defendant Union Pacific Railroad Company. Related Case(s): CV 06-3016 DSF (FMOx), CV 06-3017 AHM (MANx), CV 06-3018 R (RZx), CV 06-3019 SVW (CTx) (rn) (Entered: 05/31/2006)
		* * *
05/31/2006		PREPARED ORDER RE TRANSFER Pursuant to General Order 224 (Related Case) by Clerk; related to CV 06-3016

		DSF (FMOx). (rn) (Entered: 05/31/2006)
		* * *
05/31/2006	15	CROSSCLAIM against Cross Defendant Union Pacific Railroad Company, filed by cross claimant Kawasaki Kisen Kaisha Ltd.(bg) (Entered: 06/02/2006)
		* * *
06/02/2006	13	ORDER RE TRANSFER PURSUANT TO GENERAL ORDER 224 -Related Case- filed. Related Case No: CV 06-3016 DSF (FMOx). Case transferred from Judge A. Howard Matz and Margaret A. Nagle to Judge Dale S. Fischer and Fernando M. Olguin for all further proceedings. The case number will now reflect the initials of the transferee Judge CV 06-3017 DSF (FMOx).Signed by Judge Dale S. Fischer (rn) (Entered: 06/02/2006)
		* * *
07/26/2006	26	JOINT REPORT Rule 26(f) Discovery Plan filed; estimated length of trial Plaintiff estimates a 5 day jury trial; "K" Line estimates a 10-15 day court trial; United Pacific anticipates the jury trial will last thirty "court days". (klg) (Entered: 07/27/2006)

* * *

08/08/2006	29	STIPULATION ORDER TO CONSOLIDATE THE Within Actions by Judge Dale S. Fischer :Pursuant to the foregoing Stipulation of the parties, and good cause appearing, IT IS HEREBY ORDERED that Case Nos. CV-06-03016, CV-03-3017, and CV-06-3018 and CV-06-3019 are hereby consolidated before this Court for all purposes, that the Order re Jury Trial filed July 5, 2006 in Case CV-06-3016 shall apply and govern all consolidated cases, and further that the Scheduling Conference set for August 14, 2006, at 11:00 am in Case numbers CV-06-3017, CV-06-3018 and CV-06-3019 shall be and is hereby ordered off-calendar(yl) (Entered: 08/10/2006)
08/10/2009	30	MINUTES OF IN CHAMBERS ORDER re Stay of Consolidated Cases by Judge Dale S. Fischer: For clarity, these cases were stayed as of May 22, 2009, when lead consolidated case Regal-Beloit Corp. v. Kawasaki Kisen Kaisha Ltd., CV 06-3016 DSF (FMOx) was stayed. IT IS SO ORDERED. (shb) (Entered: 08/11/2009)

U.S. District Court for the Central District of California

PICC Property & Casualty Co., Ltd. Shanghai Branch. v. Kawasaki Kisen Kaisha Ltd.
Case No. 2:06-cv-03018-DSF-FMO

Date Filed	#	Docket Text
05/17/2006	1	NOTICE OF REMOVAL from Los Angeles County Superior Court; South Division, case number 06C01252 with copy of summons and complaint. Case assigned to Judge Manuel L. Real, Discovery to Magistrate Judge Ralph Zarefsky. (Filing fee $350) filed by defendant Union Pacific Railroad Company.(jag,) (Entered: 05/25/2006)
		* * *
05/26/2006	8	NOTICE of Related Case(s) filed by Defendant Union Pacific Railroad Company. Related Case(s): CV 06-3016 DSF (FMOx), CV 06-3017 AHM (MANx), CV 06-3018 R (RZx), CV 06-3019 SVW (CTx) (rn) (Entered: 05/31/2006))
		* * *
05/31/2006		PREPARED ORDER RE TRANSFER Pursuant to General Order 224 (Related Case) by Clerk; related to CV 06-3016

		DSF (FMOx). (rn) (Entered: 05/31/2006)
		* * *
06/02/2006	11	ORDER RE TRANSFER PURSUANT TO GENERAL ORDER 224 -Related Case- filed. Related Case No: CV 06-3016 DSF (FMOx). Case transfered from Judge Manuel L. Real and Ralph Zarefsky to Judge Dale S. Fischer and Fernando M. Olguin for all further proceedings. The case number will now reflect the initials of the transferee Judge CV 06-3018 DSF (FMOx).Signed by Judge Dale S. Fischer (rn) (Entered: 06/02/2006)
		* * *
07/26/2006	26	JOINT REPORT Rule 26(f) Discovery Plan filed; Plaintiff estimates a five day jury trial; "K" Line and KAM estimate a 10-15 day court trial; Union Pacific anticipates the jury trial will last 30 "court days". (klg) (Entered: 07/27/2006)
		* * *
08/08/2006	31	STIPULATION AND ORDER by Judge Dale S. Fischer that Case Nos. CV 06-3016, CV 06-3017, CV 06-3018 and CV 06-3019 are hereby consolidated before

		this Court for all purposes, that the Order re Jury Trial filed 7/5/06 in Case CV 06-3016 shall apply and govern all consolidated cases, and further that the Scheduling Conference set for 8/14/06 at 11:00 am, in Case Nos. CV 06-3017, CV 06-3018 and CV 06-3019 shall be and is hereby ordered off-calendar.(pbap) (Entered: 08/10/2006)
08/08/2006		***Terminated 8/14/06 hearings. (pbap) (Entered: 08/11/2006)
		* * *
08/10/2006	33	MINUTES OF IN CHAMBERS ORDER re STAY OF CONSOLIDATED CASES by Judge Dale S. Fischer: For clarity, these cases were stayed as of May 22, 2009, when lead consolidated case Regal-Beloit Corp. v. Kawasaki Kisen Kaisha Ltd., CV 06-3016 DSF (FMOx) was stayed. IT IS SO ORDERED. (shb) (Entered: 08/11/2009)

U.S. District Court for the Central District of California

Royal & Sun Alliance Ins. Co., Ltd.. v. Kawasaki Kisen Kaisha, Ltd.
Case No. 2:06-cv-03019-DSF-FMO

Date Filed	#	Docket Text
05/17/2006	1	NOTICE OF REMOVAL from Los Angeles County Superior Court; South Division, case number 06C01253 with copy of summons and complaint. Case assigned to Judge Stephen V. Wilson, Discovery to Magistrate Judge Carolyn Turchin. (Filing fee $350) filed by defendant Union Pacific Railroad Company.(jag) (Entered: 05/25/2006)
		* * *
05/24/2006	6	ANSWER to complaint within Notice of Removal, 1 filed by defendant Union Pacific Railroad Company.(lc) (Entered: 05/25/2006)
05/24/2006	7	CROSSCLAIM against cross defendants ROES 1-5, Kawasaki Kisen Kaisha Ltd, filed by defendant Union Pacific Railroad Company.(lc) (Entered: 05/25/2006)
		* * *
05/26/2009	9	NOTICE of Related Case(s) filed

		by Defendant Union Pacific Railroad Company. Related Case(s): CV 06-3016 DSF (FMOx), CV 06-3017 AHM (MANx), CV 06-3018 R (RZx), CV 06-3019 SVW (CTx) (rn) (Entered: 05/31/2006)
		* * *
05/31/2006		PREPARED ORDER RE TRANSFER Pursuant to General Order 224 (Related Case) by Clerk; related to CV 06-3016 DSF (FMOx). (rn) (Entered: 05/31/2006)
		* * *
06/02/2006	16	ORDER RE TRANSFER PURSUANT TO GENERAL ORDER 224 -Related Case- filed. Related Case No: CV 06-3016 DSF (FMOx). Case transferred from Judge Carolyn Turchin and Stephen V. Wilson to Judge Dale S. Fischer and Fernando M. Olguin for all further proceedings. The case number will now reflect the initials of the transferee Judge CV 06-3019 DSF (FMOx).Signed by Judge Dale S. Fischer (rn) (Entered: 06/02/2006)
		* * *
07/25/2006	26	JOINT RULE 26(f) REPORT filed; estimated length of trial 5-

		30 days. (shb) (Entered: 07/26/2006)
		* * *
08/08/2009	32	STIPULATION AND ORDER by Judge Dale S. Fischer that Case Nos. CV 06-3016, CV 06-3017, CV 06-3018 and CV 06-3019 are hereby consolidated before this Court for all purposes, that the Order re Jury Trial filed 7/5/06 in Case CV 06-3016 shall apply and govern all consolidated cases, and further that the Scheduling Conference set for 8/14/06 at 11:00 am, in Case Nos. CV 06-3017, CV 06-3018 and CV 06-3019 shall be and is hereby ordered off-calendar. (lc) (Entered: 08/09/2006)
08/10/2009	33	MINUTES OF IN CHAMBERS ORDER RE STAY OF CONSOLIDATED CASES by Judge Dale S. Fischer: For clarity, these cases were stayed as of May 22, 2009, when lead consolidated case Regal-Beloit Corp. v. Kawasaki Kisen Kaisha Ltd., CV 06-3016 DSF (FMOx) was stayed. IT IS SO ORDERED. (shb) (Entered: 08/11/2009)

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Attorneys for Plaintiff,
VICTORY FIREWORKS, INC.

SUPERIOR COURT FOR THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES – SOUTH DISTRICT

VICTORY FIREWORKS, INC. Plaintiff, vs. KAWASAKI KISEN KAISHA, LTD.; K-LINE AMERICA, INC.; UNION PACIFIC RAILROAD COMPANY; BURLINGTON NORTHERN AND SANTA FE RAILWAY; and DOES 1 through 20, inclusive, Defendants.	) Case No. NC038303)) **COMPLAINT FOR**) **NON-DELIVERY**) **AND DAMAGE TO**) **CARGO;**) **NEGLIGENCE/**) **WILFUL**) **MISCONDUCT;**) **BREACH OF**) **CONTRACT;**) **BREACH OF**) **BAILMENT;**) **BREACH OF**) **WARRANTY**)

Plaintiff alleges:

FIRST CAUSE OF ACTION AGAINST ALL DEFENDANTS

(Non-Delivery and Damage to Cargo)

1. Plaintiff, VICTORY FIREWORKS, INC. (hereinafter "VICTORY" or "Plaintiff") is a corporation authorized to do business in the State of California with an office and place of business at 579 Vincent Lane, Ellsworth, Wisconsin 54011. Plaintiff brings this action on its own behalf and on behalf of all others having any interest in the Cargo referred to below.

2. At all times material herein, Defendants, KAWASAKI KISEN KAISHA, LTD., and K-LINE AMERICA, INC., (hereinafter collectively "K-LINE" or with Does, "Defendants") were corporations doing business in this judicial district as common carriers and freight forwarders with an office and place of business at 8730 Stony Point Parkway, Richmond, Virginia 23235.

3. At all times material herein, Defendant, UNION PACIFIC RAILROAD COMPANY, (hereinafter "UP" or with Does, "Defendants") was a corporation doing business in this judicial district as a common carrier of goods for hire by rail with an office and place of business at 5480 Ferguson Drive, Suite 100, Los Angeles, California 90022.

4. At all times material herein, Defendant, BURLINGTON NORTHERN AND SANTA FE RAILWAY, (hereinafter "BNSF" or with Does "Defendants"), was a corporation doing business in this judicial district as a common carrier of goods for hire by rail with an office and place of business at 3770 E. Washington Blvd., Los Angeles, California 90023.

5. Plaintiff has no knowledge of the true names and capacities of Defendants sued herein as Does 1 through 20 inclusive, except that Plaintiff is informed

and believes, and on that basis alleges, the damage to the cargo was proximately caused by Defendants' wrongful acts. Plaintiff therefore sues these Defendants by such fictitious names and Plaintiff will amend this complaint to allege their true names and capacities when ascertained.

6. Plaintiff is informed and believes, and on that basis alleges, that each of the Doe Defendants were at all times herein mentioned the agent, servant, employee or contractor of the other Defendants.

7. On or about March 30, 2005, non-UP and BNSF Defendants accepted a shipment consisting of assorted fireworks ("Cargo") to be to be carried from Beihai, China to Minneapolis, Minnesota via the Port of Long Beach, in the same good order and condition as when received in Container No. KKFU1595257 under the face of K-LINE bill of lading number KKLU826146965 dated March 30, 2005.

8. On or about April 19, 2005, non-K-LINE Defendants accepted the shipment of Cargo for carriage from Long Beach to Minneapolis, Minnesota in the same good condition as when received from the contracting carriers.

9. Defendants, and each of them, failed and neglected to carry, handle, monitor and deliver the Cargo and maintain its good order and condition as when received. To the contrary, the Cargo was damaged/destroyed during a train derailment in Oklahoma on or about April 21, 2005.

10. By reason of the foregoing, Plaintiff has been damaged in the sum of $40,893.70, plus expenses, interest and costs, no part of which has been paid by Defendants despite demand therefor.

SECOND CAUSE OF ACTION AGAINST ALL DEFENDANTS

(Negligence/Willful Misconduct)

11. Plaintiff refers to paragraphs 1 through 10, inclusive, of this complaint and incorporates them herein as though fully set forth.

12. The loss to the Cargo was directly and proximately caused by the negligence, carelessness, gross negligence and willful misconduct of Defendants, and each of them.

13. By reason of the foregoing, Plaintiff has been damaged in the sum of $40,893.70, plus expenses, interest and costs, no part of which has been paid by Defendants despite demand therefor.

THIRD CAUSE OF ACTION AGAINST ALL DEFENDANTS

(Breach of Contract)

14. Plaintiff refers to paragraphs 1 through 13 inclusive, of this complaint and incorporates them herein as though fully set forth.

15. On or about March 30, 2005, Defendants, and each of them, agreed to safely handle, store, count, transport and deliver the Cargo in the same good order and condition as when received.

16. Defendants, and each of them, materially and substantially breached and deviated from their agreements by failing to deliver the Cargo in the same good order and condition as when received.

17. Plaintiff performed all conditions and covenants, if any, required to be performed by them in accordance with the terms and conditions of the agreements, and otherwise is excused from any such conditions and covenants.

18. By reason of the foregoing, Plaintiff has been damaged in the sum of $40,893.70, plus expenses, interest and costs, no part of which has been paid by Defendants despite demand therefor.

FOURTH CAUSE OF ACTION AGAINST ALL DEFENDANTS

(Breach of Bailment)

19. Plaintiff refers to paragraphs 1 through 18, inclusive, of this complaint and incorporates them herein as though fully set forth.

20. The damage of the Cargo was directly and proximately caused by the acts and omissions of Defendants, and each of them, in violation of their statutory and common law duties and obligations as bailees to safely care for the Cargo.

21. By reason of the foregoing, Plaintiff has been damaged in the sum of $40,893.70, plus expenses, interest and costs, no part of which has been paid by Defendants despite demand therefor.

FIFTH CAUSE OF ACTION AGAINST ALL DEFENDANTS

(Breach of Warranty)

22. Plaintiff refers to paragraphs 1 through 21, inclusive, of the Complaint and incorporates them herein as though fully set forth.

23. In loading, monitoring and unloading the Cargo, Defendants warranted that they would perform the services in a workmanlike manner using the proper equipment and personnel.

24. Defendants improperly stowed, loaded, monitored and offloaded the Cargo and thus, breached their warranty.

25. By reason of the foregoing, Plaintiff has been damaged in the sum of $40,893.70, plus expenses, interest and costs, no part of which has been paid by Defendants despite demand therefor.

PRAYER

WHEREFORE, Plaintiff prays for judgment against Defendants, jointly and severally, as follows:

1. For general damages in the sum of $40,893.70 plus expenses;

2. For pre-judgment interest at the rate of 10% per annum from April 21, 2005;

3. For post-judgment interest at the rate of 10% per annum;

4. For costs of suit herein; and

5. For such other and further relief as this court deems just and proper.

Dated: April 10, 2006

LAW OFFICES OF
DENNIS A.
CAMMARANO

By: s/Dennis A. Cammarano
Dennis A. Cammarano
Attorneys for Plaintiff,
VICTORY
FIREWORKS, INC.
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Attorneys for Plaintiff,
PICC PROPERTY & CASUALTY COMPANY
LIMITED SHANGHAI BRANCH

SUPERIOR COURT FOR THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES – LONG BEACH JUDICAL DISTRICT
[LIMITED CIVIL CASE]

PICC PROPERTY & CASUALTY COMPANY LIMITED SHANGHAI BRANCH, Plaintiff, vs. KAWASAKI KISEN KAISHA, LTD.; K-LINE AMERICA, INC.; UNION PACIFIC RAILROAD COMPANY; BURLINGTON NORTHERN AND SANTA FE RAILWAY; and DOES 1 through 20, inclusive, Defendants.	) Case No. 06C01252)) **COMPLAINT FOR**) **NON-DELIVERY**) **AND DAMAGE TO**) **CARGO;**) **NEGLIGENCE/**) **WILFUL**) **MISCONDUCT;**) **BREACH OF**) **CONTRACT;**) **BREACH OF**) **BAILMENT;**) **BREACH OF**) **WARRANTY**)) **[OVER $10,000.00]**)

Plaintiff alleges:

FIRST CAUSE OF ACTION AGAINST ALL DEFENDANTS

(Non-Delivery and Damage to Cargo)

1. Plaintiff, PICC PROPERTY & CASUALTY COMPANY LIMITED SHANGHAI BRANCH (hereinafter "PICC" or "Plaintiff") is a foreign insurance corporation with an office and place of business at 2 Floor, 700 Zhongshan Road (S), Shanghai 2000010, China. Plaintiff brings this action on its own behalf and on behalf of all others having any interest in the Cargo referred to below in that Plaintiff insured the cargo against the risks of loss alleged below.

2. At all times material herein, Defendants, KAWASAKI KISEN KAISHA, LTD., and K-LINE AMERICA, INC., (hereinafter collectively "K-LINE" or with Does, "Defendants") were corporations doing business in this judicial district as common carriers and freight forwarders with an office and place of business at 8730 Stony Point Parkway, Richmond, Virginia 23235.

3. At all times material herein, Defendant, UNION PACIFIC RAILROAD COMPANY, (hereinafter "UP" or with Does, "Defendants") was a corporation doing business in this judicial district as a common carrier of goods for hire by rail with an office and place of business at 5480 Ferguson Drive, Suite 100, Los Angeles, California 90022.

4. At all times material herein, Defendant, BURLINGTON NORTHERN AND SANTA FE RAILWAY, (hereinafter "BNSF" or with Does "Defendants"), was a corporation doing business in this judicial district as a common carrier of goods for hire

by rail with an office and place of business at 3770 E. Washington Blvd., Los Angeles, California 90023.

5. Plaintiff has no knowledge of the true names and capacities of Defendants sued herein as Does 1 through 20 inclusive, except that Plaintiff is informed and believes, and on that basis alleges, the damage to the cargo was proximately caused by Defendants' wrongful acts. Plaintiff therefore sues these Defendants by such fictitious names and Plaintiff will amend this complaint to allege their true names and capacities when ascertained.

6. Plaintiff is informed and believes, and on that basis alleges, that each of the Doe Defendants were at all times herein mentioned the agent, servant, employee or contractor of the other Defendants.

7. On or about April 3, 2005, non-UP and BNSF Defendants accepted a shipment consisting of electric motors parts ("Cargo") to be to be carried from Shanghai, China to Milwaukee, Wisconsin via the Port of Long Beach, in the same good order and condition as when received in Container Nos. KKTU742574, KKFU906752, TRLU300291 and KLTU760096 under the face of K-LINE bill of lading number KKLUSH7807068 dated April 3, 2005.

8. On or about April 19, 2005, non-K-LINE Defendants accepted the shipment of Cargo for carriage from Long Beach to Milwaukee, Wisconsin in the same good condition as when received from the contracting carriers.

9. Defendants, and each of them, failed and neglected to carry, handle, monitor and deliver the Cargo and maintain its good order and condition as when received. To the contrary, the Cargo was

damaged/destroyed during a train derailment in Oklahoma on or about April 21, 2005.

10. By reason of the foregoing, Plaintiff has been damaged in the sum of $12,524.07, plus expenses, interest and costs, no part of which has been paid by Defendants despite demand therefor.

SECOND CAUSE OF ACTION AGAINST ALL DEFENDANTS

(Negligence/Willful Misconduct)

11. Plaintiff refers to paragraphs 1 through 10, inclusive, of this complaint and incorporates them herein as though fully set forth.

12. The loss to the Cargo was directly and proximately caused by the negligence, carelessness, gross negligence and willful misconduct of Defendants, and each of them.

13. By reason of the foregoing, Plaintiff has been damaged in the sum of $12,524.07, plus expenses, interest and costs, no part of which has been paid by Defendants despite demand therefor.

THIRD CAUSE OF ACTION AGAINST ALL DEFENDANTS

(Breach of Contract)

14. Plaintiff refers to paragraphs 1 through 13 inclusive, of this complaint and incorporates them herein as though fully set forth.

15. On or about April 3, 2005, Defendants, and each of them, agreed to safely handle, store, count, transport and deliver the Cargo in the same good order and condition as when received.

16. Defendants, and each of them, materially and substantially breached and deviated from their

agreements by failing to deliver the Cargo in the same good order and condition as when received.

17. Plaintiff performed all conditions and covenants, if any, required to be performed by them in accordance with the terms and conditions of the agreements, and otherwise is excused from any such conditions and covenants.

18. By reason of the foregoing, Plaintiff has been damaged in the sum of $12,524.07, plus expenses, interest and costs, no part of which has been paid by Defendants despite demand therefor.

FOURTH CAUSE OF ACTION AGAINST ALL DEFENDANTS

(Breach of Bailment)

19. Plaintiff refers to paragraphs 1 through 18, inclusive, of this complaint and incorporates them herein as though fully set forth.

20. The damage of the Cargo was directly and proximately caused by the acts and omissions of Defendants, and each of them, in violation of their statutory and common law duties and obligations as bailees to safely care for the Cargo.

21. By reason of the foregoing, Plaintiff has been damaged in the sum of $12,524.07, plus expenses, interest and costs, no part of which has been paid by Defendants despite demand therefor.

FIFTH CAUSE OF ACTION AGAINST ALL DEFENDANTS

(Breach of Warranty)

22. Plaintiff refers to paragraphs 1 through 21, inclusive, of the Complaint and incorporates them herein as though fully set forth.

23. In loading, monitoring and unloading the Cargo, Defendants warranted that they would perform the services in a workmanlike manner using the proper equipment and personnel.

24. Defendants improperly stowed, loaded, monitored and offloaded the Cargo and thus, breached their warranty.

25. By reason of the foregoing, Plaintiff has been damaged in the sum of $12,524.07, plus expenses, interest and costs, no part of which has been paid by Defendants despite demand therefor.

PRAYER

WHEREFORE, Plaintiff prays for judgment against Defendants, jointly and severally, as follows:

1. For general damages in the sum of $12,524.07 plus expenses;

2. For pre-judgment interest at the rate of 10% per annum from April 21, 2005;

3. For post-judgment interest at the rate of 10% per annum;

4. For costs of suit herein; and

5. For such other and further relief as this court deems just and proper.

Dated: April 13, 2006

LAW OFFICES OF
DENNIS A.
CAMMARANO

By: s/Dennis A. Cammarano
Dennis A. Cammarano
Attorneys for Plaintiff,
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CASUALTY COMPANY
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Attorneys for Plaintiff,
REGAL-BELOIT CORPORATION

SUPERIOR COURT FOR THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES – SOUTH DISTRICT

REGAL-BELOIT CORPORATION, Plaintiff, vs. KAWASAKI KISEN KAISHA, LTD.; K-LINE AMERICA, INC.; UNION PACIFIC RAILROAD COMPANY; BURLINGTON NORTHERN AND SANTA FE RAILWAY; and DOES 1 through 20, inclusive, Defendants.	) Case No. NC038310)) **COMPLAINT FOR**) **NON-DELIVERY**) **AND DAMAGE TO**) **CARGO;**) **NEGLIGENCE/**) **WILFUL**) **MISCONDUCT;**) **BREACH OF**) **CONTRACT;**) **BREACH OF**) **BAILMENT;**) **BREACH OF**) **WARRANTY**)

Plaintiff alleges:

FIRST CAUSE OF ACTION AGAINST ALL DEFENDANTS

(Non-Delivery and Damage to Cargo)

1. Plaintiff, REGAL-BELOIT CORPORATION (hereinafter "RBC" or "Plaintiff") is a foreign corporation with an office and place of business at 200 State Street, Beloit, Wisconsin 53511. Plaintiff brings this action on its own behalf and on behalf of all others having any interest in the Cargo referred to below.

2. At all times material herein, Defendants, KAWASAKI KISEN KAISHA, LTD., and K-LINE AMERICA, INC., (hereinafter collectively "K-LINE" or with Does, "Defendants") were corporations doing business in this judicial district as common carriers and freight forwarders with an office and place of business at 8730 Stony Point Parkway, Richmond, Virginia 23235.

3. At all times material herein, Defendant, UNION PACIFIC RAILROAD COMPANY, (hereinafter "UP" or with Does, "Defendants") was a corporation doing business in this judicial district as a common carrier of goods for hire by rail with an office and place of business at 5480 Ferguson Drive, Suite 100, Los Angeles, California 90022.

4. At all times material herein, Defendant, BURLINGTON NORTHERN AND SANTA FE RAILWAY, (hereinafter "BNSF" or with Does "Defendants"), was a corporation doing business in this judicial district as a common carrier of goods for hire by rail with an office and place of business at 3770 E. Washington Blvd., Los Angeles, California 90023.

5. Plaintiff has no knowledge of the true names and capacities of Defendants sued herein as Does 1 through 20 inclusive, except that Plaintiff is informed and believes, and on that basis alleges, the damage to the cargo was proximately caused by Defendants'

wrongful acts. Plaintiff therefore sues these Defendants by such fictitious names and Plaintiff will amend this complaint to allege their true names and capacities when ascertained.

6. Plaintiff is informed and believes, and on that basis alleges, that each of the Doe Defendants were at all times herein mentioned the agent, servant, employee or contractor of the other Defendants.

7. On or about April 3, 2005, non-UP and BNSF Defendants accepted a shipment consisting of electric motors ("Cargo") to be to be carried from Shanghai, China to Indianapolis, Indiana via the Port of Long Beach, in the same good order and condition as when received in Container Nos. KKTU7192886 and KLTU7626760 under the face of K-LINE bill of lading number KKLUSH7807066 dated April 3, 2005.

8. On or about April 19, 2005, non-K-LINE Defendants accepted the shipment of Cargo for carriage from Long Beach to Indianapolis, Indiana in the same good condition as when received from the contracting carriers.

9. Defendants, and each of them, failed and neglected to carry, handle, monitor and deliver the Cargo and maintain its good order and condition as when received. To the contrary, the Cargo was damaged/destroyed during a train derailment in Oklahoma on or about April 21, 2005.

10. By reason of the foregoing, Plaintiff has been damaged in the sum of $100,000.00, plus expenses, interest and costs, no part of which has been paid by Defendants despite demand therefor.

SECOND CAUSE OF ACTION AGAINST ALL DEFENDANTS

(Negligence/Willful Misconduct)

11. Plaintiff refers to paragraphs 1 through 10, inclusive, of this complaint and incorporates them herein as though fully set forth.

12. The loss to the Cargo was directly and proximately caused by the negligence, carelessness, gross negligence and willful misconduct of Defendants, and each of them.

13. By reason of the foregoing, Plaintiff has been damaged in the sum of $100,000.00, plus expenses, interest and costs, no part of which has been paid by Defendants despite demand therefor.

THIRD CAUSE OF ACTION AGAINST ALL DEFENDANTS

(Breach of Contract)

14. Plaintiff refers to paragraphs 1 through 13 inclusive, of this complaint and incorporates them herein as though fully set forth.

15. On or about April 3, 2005, Defendants, and each of them, agreed to safely handle, store, count, transport and deliver the Cargo in the same good order and condition as when received.

16. Defendants, and each of them, materially and substantially breached and deviated from their agreements by failing to deliver the Cargo in the same good order and condition as when received.

17. Plaintiff performed all conditions and covenants, if any, required to be performed by them in accordance with the terms and conditions of the agreements, and otherwise is excused from any such conditions and covenants.

18. By reason of the foregoing, Plaintiff has been damaged in the sum of $100,000.00, plus expenses, interest and costs, no part of which has been paid by Defendants despite demand therefor.

FOURTH CAUSE OF ACTION AGAINST ALL DEFENDANTS

(Breach of Bailment)

19. Plaintiff refers to paragraphs 1 through 18, inclusive, of this complaint and incorporates them herein as though fully set forth.

20. The damage of the Cargo was directly and proximately caused by the acts and omissions of Defendants, and each of them, in violation of their statutory and common law duties and obligations as bailees to safely care for the Cargo.

21. By reason of the foregoing, Plaintiff has been damaged in the sum of $100,000.00, plus expenses, interest and costs, no part of which has been paid by Defendants despite demand therefor.

FIFTH CAUSE OF ACTION AGAINST ALL DEFENDANTS

(Breach of Warranty)

22. Plaintiff refers to paragraphs 1 through 21, inclusive, of the Complaint and incorporates them herein as though fully set forth.

23. In loading, monitoring and unloading the Cargo, Defendants warranted that they would perform the services in a workmanlike manner using the proper equipment and personnel.

24. Defendants improperly stowed, loaded, monitored and offloaded the Cargo and thus, breached their warranty.

25. By reason of the foregoing, Plaintiff has been damaged in the sum of $100,000.00, plus expenses, interest and costs, no part of which has been paid by Defendants despite demand therefor.

PRAYER

WHEREFORE, Plaintiff prays for judgment against Defendants, jointly and severally, as follows:

1. For general damages in the sum of 100,000.00 plus expenses;

2. For pre-judgment interest at the rate of 10% per annum from April 21, 2005;

3. For post-judgment interest at the rate of 10% per annum;

4. For costs of suit herein; and

5. For such other and further relief as this court deems just and proper.

Dated: April 13, 2006

LAW OFFICES OF
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CAMMARANO

By: s/Dennis A. Cammarano
Dennis A. Cammarano
Attorneys for Plaintiff,
REGAL-BELOIT
CORPORATION
232012

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Attorneys for Plaintiff,
ROYAL & SUN ALLIANCE INSURANCE CO., LTD.

SUPERIOR COURT FOR THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES – LONG BEACH JUDICIAL DISTRICT
[LIMITED CIVIL CASE]

ROYAL & SUN ALLIANCE INSURANCE CO., LTD.,	) Case No. 06C01253
Plaintiff,	) **COMPLAINT FOR NON-DELIVERY AND DAMAGE TO CARGO; NEGLIGENCE/ WILFUL MISCONDUCT; BREACH OF CONTRACT; BREACH OF BAILMENT; BREACH OF WARRANTY [UNDER $10,000.00]**
vs.	
KAWASAKI KISEN KAISHA, LTD.; K-LINE AMERICA, INC.; UNION PACIFIC RAILROAD COMPANY; BURLINGTON NORTHERN AND SANTA FE RAILWAY; and DOES 1 through 20, inclusive,	
Defendants.	

Plaintiff alleges:

FIRST CAUSE OF ACTION AGAINST ALL DEFENDANTS

(Non-Delivery and Damage to Cargo)

1. Plaintiff, ROYAL & SUN ALLIANCE INSURANCE CO., LTD., (hereinafter "ROYAL" or "Plaintiff") is an insurance corporation authorized by law with an office and place of business c/o Vericlaim, Inc., 195 Broadway, 20th Floor, New York, New York 10007. Plaintiff brings this action on its own behalf and on behalf of all others having any interest in the Cargo referred to below in that Plaintiff insured the cargo against the risks of loss alleged below.

2. At all times material herein, Defendants, KAWASAKI KISEN KAISHA, LTD., and K-LINE AMERICA, INC., (hereinafter collectively "K-LINE" or with Does, "Defendants") were corporations doing business in this judicial district as common carriers and freight forwarders with an office and place of business at 8730 Stony Point Parkway, Richmond, Virginia 23235.

3. At all times material herein, Defendant. UNION PACIFIC RAILROAD COMPANY, (hereinafter "UP" or with Does, "Defendants") was a corporation doing business in this judicial district as a common carrier of goods for hire by rail with an office and place of business at 5480 Ferguson Drive, Suite 100, Los Angeles, California 90022.

4. At all times material herein, Defendant, BURLINGTON NORTHERN AND SANTA FE RAILWAY, (hereinafter "BNSF" or with Does "Defendants"), was a corporation doing business in this judicial district as a common carrier of goods for hire

by rail with an office and place of business at 3770 E. Washington Blvd., Los Angeles, California 90023.

5. Plaintiff has no knowledge of the true names and capacities of Defendants sued herein as Does 1 through 20 inclusive, except that Plaintiff is informed and believes, and on that basis alleges, the damage to the cargo was proximately caused by Defendants' wrongful acts. Plaintiff therefore sues these Defendants by such fictitious names and Plaintiff will amend this complaint to allege their true names and capacities when ascertained.

6. Plaintiff is informed and believes, and on that basis alleges, that each of the Doe Defendants were at all times herein mentioned the agent, servant, employee or contractor of the other Defendants.

7. On or about April 1, 2005, non-UP and BNSF Defendants accepted a shipment consisting of retainer nail castings ("Cargo") to be to be carried from Zhangjiagang, China to Chicago, Illinois via the Port of Long Beach, in the same good order and condition as when received in Container No. KKTU7102774 under the face of K-LINE bill of lading number KKLUZG64000686 dated April 1, 2005.

8. On or about April 19, 2005, non-K-LINE Defendants accepted the shipment of Cargo for carriage from Long Beach to Chicago, Illinois in the same good condition as when received from the contracting carriers.

9. Defendants, and each of them, failed and neglected to carry, handle, monitor and deliver the Cargo and maintain its good order and condition as when received. To the contrary, the Cargo was damaged/destroyed during a train derailment in Oklahoma on or about April 21, 2005.

10. By reason of the foregoing, Plaintiff has been damaged in the sum of $3,012.00, plus expenses, interest and costs, no part of which has been paid by Defendants despite demand therefor.

SECOND CAUSE OF ACTION AGAINST ALL DEFENDANTS

(Negligence/Willful Misconduct)

11. Plaintiff refers to paragraphs 1 through 10, inclusive, of this complaint and incorporates them herein as though fully set forth.

12. The loss to the Cargo was directly and proximately caused by the negligence, carelessness, gross negligence and willful misconduct of Defendants, and each of them.

13. By reason of the foregoing, Plaintiff has been damaged in the sum of $3,012.00, plus expenses, interest and costs, no part of which has been paid by Defendants despite demand therefor.

THIRD CAUSE OF ACTION AGAINST ALL DEFENDANTS

(Breach of Contract)

14. Plaintiff refers to paragraphs 1 through 13 inclusive, of this complaint and incorporates them herein as though fully set forth.

15. On or about April 1, 2005, Defendants, and each of them, agreed to safely handle, store, count, transport and deliver the Cargo in the same good order and condition as when received.

16. Defendants, and each of them, materially and substantially breached and deviated from their agreements by failing to deliver the Cargo in the same good order and condition as when received.

17. Plaintiff performed all conditions and covenants, if any, required to be performed by them in accordance with the terms and conditions of the agreements, and otherwise is excused from any such conditions and covenants.

18. By reason of the foregoing, Plaintiff has been damaged in the sum of $3,012.00, plus expenses, interest and costs, no part of which has been paid by Defendants despite demand therefor.

FOURTH CAUSE OF ACTION AGAINST ALL DEFENDANTS

(Breach of Bailment)

19. Plaintiff refers to paragraphs 1 through 18, inclusive, of this complaint and incorporates them herein as though fully set forth.

20. The damage of the Cargo was directly and proximately caused by the acts and omissions of Defendants, and each of them, in violation of their statutory and common law duties and obligations as bailees to safely care for the Cargo.

21. By reason of the foregoing, Plaintiff has been damaged in the sum of $3,012.00, plus expenses, interest and costs, no part of which has been paid by Defendants despite demand therefor.

FIFTH CAUSE OF ACTION AGAINST ALL DEFENDANTS

(Breach of Warranty)

22. Plaintiff refers to paragraphs 1 through 21, inclusive, of the Complaint and incorporates them herein as though fully set forth.

23. In loading, monitoring and unloading the Cargo, Defendants warranted that they would

perform the services in a workmanlike manner using the proper equipment and personnel.

24. Defendants improperly stowed, loaded, monitored and offloaded the Cargo and thus, breached their warranty.

25. By reason of the foregoing, Plaintiff has been damaged in the sum of $3,012.00, plus expenses, interest and costs, no part of which has been paid by Defendants despite demand therefor.

PRAYER

WHEREFORE, Plaintiff prays for judgment against Defendants, jointly and severally, as follows:

1. For general damages in the sum of $3,012.00 plus expenses;

2. For pre-judgment interest at the rate of 10% per annum from April 21, 2005;

3. For post-judgment interest at the rate of 10% per annum;

4. For costs of suit herein; and

5. For such other and further relief as this court deems just and proper.

Dated: April 14, 2006

LAW OFFICES OF
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Attorneys for Petitioner and Defendant
UNION PACIFIC RAILROAD COMPANY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

REGAL-BELOIT CORPORATION	)	CASE NO. CV 06 3016 DSF (FMOx)
Plaintiff,	)	**NOTICE OF REMOVAL AND PETITION FOR REMOVAL OF ACTION**
vs.	)	
KAWASAKI KISEN KAISHA, LTD.; "K" Line AMERICA, INC.; UNION PACIFIC RAILROAD COMPANY; BURLINGTON NORTHERN AND SANTA FE RAILWAY and DOES 1 through 20, inclusive	)	
Defendants.	)	

TO THE CLERK AND THE HONORABLE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA:

PLEASE TAKE NOTICE that Petitioner and Defendant UNION PACIFIC RAILROAD COMPANY, ("Petitioner" or "UPRR"), hereby removes to this Court the state court action described below and respectfully shows upon information and belief:

1. That Petitioner is a named defendant in the above-entitled action brought by plaintiff Regal-Beloit Corporation (hereafter "Regal") which action is now pending in the Superior Court of the State of California, County of Los Angeles, South District, under Case No. NC038310 (hereafter "the State Court action"). Petitioner has a right to remove the State Court action to this Court.

2. That on or about April 27, 2006, the Summons and Complaint, were served upon CT Corporation System specifying the nature of the action in the aforesaid Court. A copy of the Summons on Complaint and Complaint along with all other process, proceedings and orders served on UPRR in the State Court action are annexed hereto collectively as Exhibit "A". The service of the Summons and Complaint on UPRR on April 27, 2006 was the first time UPRR received a copy of the Complaint in the State Court action (which Complaint is hereafter referred to herein as the "*Regal Complaint*".)

3. *Regal* alleges in that Complaint that cargo (electric motors) was carried in two separate shipping containers and was damaged at some point en route in interstate commerce while in the care and custody of

UPRR, a rail carrier, and while in the care and custody of "K" Line AMERICA, INC. and KAWASAKI KISEN KAISHA, LTD., a common carrier, in the course of an interstate and international movement. Specifically, in the first cause of action (for "Non-Delivery and Damage to Cargo") in Regal's Complaint in the State Court action, plaintiff alleges that UPRR, was a common carrier (Regal Complaint, 2:3-6), that UPRR received the cargo, (Regal Complaint, 2:19-23), that the cargo was damaged in UPRR's care and custody (Regal Complaint, 2:27-28, 3:1-2), and the amounts of alleged damages due to the acts or omissions of defendants (which is alleged as $100,000.00, plus expenses, interest and costs). (*Regal Complaint*, at 3:3-5.) The first cause of action in the Regal Complaint in the State Court action contains the elements required to plead a claim against UPRR under the Carmack Amendment, 49 U.S.C. § 11706 et seq. although the Carmack Amendment is not expressly mentioned. *See Newens v. Orna Services, Inc.*, 2002 U.S. Dist. LEXIS 10685. The Regal Complaint thus contains a cause of action within the meaning of 28 U.S.C. section 1441 (a claim where the court has original jurisdiction under the laws of the United States, to wit, the Carmack Amendment, 49 U.S.C. § 11706 et seq.), within the meaning of 28 U.S.C. section 1331 (a civil action arising under the laws of the United States, to wit the Carmack Amendment) and within the meaning of 28 U.S.C. section 1337(a) (a civil action under an Act of Congress under 49 U.S.C. section 11706 or 14706, title 49 where the amount in controversy for each bill of lading exceeds $10,000).

4. Moreover, Regal has sued "K" Line America, Inc. and Kawasaki Kisen Kaisha, Ltd., as carriers, on

an international movement by sea originating in a foreign country (Shanghai, China) and terminating in the U.S. (Indianapolis, Indiana) via the Port of Long Beach. (*Complaint*, 2:19-23.) This court therefore alternatively has admiralty and maritime jurisdiction over Regal's claim against "K" Line America, Inc. and Kawasaki Kisen Kaisha, Ltd. under 28 U.S.C. section 1333 [*See Norfolk Southern Railway Company v. Kirby*, 543 U.S. 14, 125 S.Ct. 385, 160 L.Ed.2d 283 (2004)]; federal question jurisdiction under 28 U.S.C. section 1331 (COGSA, 46 U.S.C. Section 1300 et. seq. and/or Harter Act, 46 U.S.C. Section 190, et seq.); and 28 U.S.C. Section 1337, since both COGSA and the Harter Act are federal statutes regulating commerce. The action is properly removable pursuant to 28 U.S.C. section 1441(b). *B.F. McKernin & Co., Inc. v. United States Lines, Inc.*, 416 F.Supp. 1068, 1071 (S.D.N.Y. 1976); accord, *Uncle Ben's v. Hapag-Lloyd Aktiengesellschaft*, 855 F.2d 215, 217 (5th Cir. 1988); *Joe Boxer v. Fritz Transp. Int'*, 1988 A.M.C. 2576 (C.D. Cal. 1998).

5. That UPRR further desires to remove The State Court Action to the District Court in the Central District of California based on diversity jurisdiction pursuant to the provisions of title 28 United States Code, Section 1332 in that the amount in controversy exceeds $75,000 and there is complete diversity of citizenship among the parties under 28 U.S.C. section 1332 at all times since the date on which the complaint was filed in the State Court Action. That on information and belief, the citizenship of each party to this action is as set forth below:

Regal-Beloit:

Incorporated in Wisconsin

Principal place of Business in Wisconsin

UPRR:

Incorporated in Delaware

Principal Place of Business in Nebraska

BNSF: (No longer a party at the time of removal)

Incorporated in Delaware

Principal place of Business in Texas

"K" Line America, Inc.:

Incorporated in Michigan

Principal place of business in Richmond, VA

Kawasaki, Kisen, Kaisha

Foreign corporation incorporated in Japan

Principal place of business is in Japan

6. This District Court has supplemental jurisdiction over other state law claims under 28 U.S.C. section 1367 in that they are transactionally related to the federal question claim.

7. KAWASAKI KISEN KAISHA, LTD. and "K" Line AMERICA, INC. received the Summons and Complaint and related documents in this matter by certified mail on May 3, 2006 with the envelopes showing a mailing date of May 1, 2006. Technically therefore, KAWASAKI KISEN KAISHA, LTD. and "K" Line AMERICA, INC. were served with the summons and complaint in the State Court action on May 11, 2006. This service of the Summons and Complaint in case Number 0601252 on KAWASAKI KISEN KAISHA, LTD. and "K" Line AMERICA, INC. was the first time KAWASAKI KISEN KAISHA, LTD. and "K" Line AMERICA, INC. received a copy of the Complaint in the State Court action. The joinder of these two defendants is filed concurrently herewith. Attached hereto as Exhibit B

collectively are true and correct copies of the documents served on "K" Line America, Inc. and Kawasaki Kisen Kaisha, Ltd. in the State Court action.

8. Defendant Burlington Northern and Santa Fe Railway was served with the summons and complaint herein on April 18, 2006 and was dismissed from this action with prejudice on May 1, 2006. See Exhibit C hereto which, collectively, are true and correct copies of the proof of service on BNSF, the documents served on BNSF by plaintiff, and the request for dismissal of BNSF from this suit with prejudice which plaintiff sent to BNSF.

9. Petitioner desires to remove this action to the District Court of the United States for the District in which the State Court action is now pending, to wit, to the U.S. District Court for the Central District of California. The Long Beach District of the Los Angeles Superior Court falls within the District encompassed by this Court, and therefore this Court is the proper court for this matter to be removed to.

> "The general venue statutes do not apply to an action that has been removed from state court. Removal *automatically satisfies* the federal venue requirements - i.e., venue is proper as long as removal is to the district in which the state action was pending. [28 USC § 1441(a); see *PT United Can Co. Ltd. v. Crown Cork & Seal Co., Inc.* (2nd Cir. 1998) 138 F.3d 65, 72.)...]"

W. Schwarzer, W. Tashima, J. Wagstaff, *Federal Civil Procedure Before Trial*, at ¶2:1048 (emphasis in original.)

10. A copy of this Notice of Removal will be served on the attorneys for plaintiff and a copy of this Notice will be filed with the Clerk of the Superior Court of the

State of California, County of Los Angeles, Central District.

11. Petitioner has a good and sufficient defense to this action.

12. No previous application for the relief sought herein has been made to this or any other Court.

WHEREFORE, Petitioner respectfully prays that the above action now pending against it in the Superior Court of the State of California, County of Los Angeles, be removed to this Court.

Dated: May 17, 2006

LAW OFFICES OF
LESLIE G.
MCMURRAY

By: s/Leslie G. McMurray
LESLIE G. MCMURRAY
Attorneys for Defendant
and Petitioner
UNION PACIFIC
RAILWAY COMPANY

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Attorneys for Defendant
UNION PACIFIC RAILROAD COMPANY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

REGAL-BELOIT CORPORATION	)	CASE NO. CV 06 3016 DSF (FMOx)
Plaintiff,	)	[AND CONSOLIDATED
vs.	)	CASES CV 06 3017 DSF (FMOx); CV 06
KAWASAKI KISEN KAISHA, LTD.; "K" Line AMERICA, INC.; UNION PACIFIC RAILROAD COMPANY; BURLINGTON NORTHERN AND SANTA FE RAILWAY and DOES 1 through 20, inclusive	)	3018 DSF (FMOx); AND CV 06 3019 DSF (FMOx)]
	)	[Assigned to Hon. Judge Dale S. Fischer]
	)	**UNION PACIFIC RAILROAD COMPANY'S NOTICE OF MOTION AND MOTION TO TRANSFER THESE CONSOLIDATED**
Defendants.	)	

UNION PACIFIC RAILROAD COMPANY, Cross-complainant, vs. KAWASAKI KISEN KAISHA, LTD.; "K" Line AMERICA, INC., AND ROES 1 through 5, inclusive, Cross-defendants.	)	**ACTIONS TO THE SOUTHERN DISTRICT OF NEW YORK PURSUANT TO 28 U.S.C. SECTION 1404(a)** DATE: Monday, September 18, 2006 TIME: 1:30 P.M. PLACE: Courtroom 840 (Roybal Building)
And related third party complaint.	)	

TO THE HONORABLE JUDGE DALE S. FISCHER TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

Please take notice that Union Pacific Railroad Company (hereinafter, "UPRR"), intends to move and hereby does move to transfer these consolidated cases to the United States District Court, Southern District of New York located at 500 Pearl Street, New York, New York, 10007-1312 pursuant to 28 U.S.C. section 1404(a) based on the convenience of the parties and witnesses and in the interests of justice.

This motion is based on this Notice of Motion and Motion, the Memorandum of Points and Authorities submitted herewith, upon the declarations of Leslie G.

McMurray, Barry N. Gutterman, Terry D. Sheldon and exhibits thereto, upon the Proposed Order submitted herewith, upon the complete file in this matter, and upon such other further evidence or argument which UPRR may present prior to or at the time of the hearing on this motion.

This motion is made following a June 14, 2006 meeting of counsel in an attempt to resolve the issues raised by this motion.[1] Plaintiff is expected to oppose the motion to transfer. Defendants "K" Line America, Inc. and Kawasaki Kisen Kaisha, Ltd. are not expected to oppose the motion to transfer. Respectfully submitted.

Dated: August 17, 2006

LAW OFFICES OF LESLIE G. MCMURRAY

BY: s/Leslie G. McMurray
LESLIE G. MCMURRAY
Attorneys for UNION PACIFIC RAILWAY COMPANY

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[1] McMurray declaration dated 6/25/06 (hereafter "LGM") at ¶11 (and see exhibit I.)

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTORY STATEMENT

UPRR hereby moves to transfer the above referenced case to the United States District Court, Southern District of New York pursuant to 28 U.S.C. section 1404(a) based on the convenience of the parties and witnesses and in the interests of justice. The following discussion of the underlying facts and procedure will inform the courts' application of the law warranting transfer.

II. THE FACTS RELATING TO PLAINTIFF'S COMPLAINT

Plaintiffs Regal-Beloit, Victory Fireworks, Inc., Royal & Sun Alliance Insurance Co., Ltd. and PICC Property & Casualty Company Limited Shanghai Branch sued UPRR, "K" Line America, Inc. ("KAM") and Kawasaki Kisen Kaisha, Ltd. ("K" Line") in four separate complaints allege that in April of 2005, UPRR accepted containers containing cargo for the inland rail portion of an international shipment from Shanghai, China to various delivery points within the United States. Plaintiffs allege in their complaints that UPRR is responsible for their cargo losses following an April 21, 2005 derailment near Tyrone, Oklahoma of the UPRR train on which the containers were being carried ("the Tyrone derailment.") These four cases are now consolidated under the lowest case number.

III. THE FACTS RELATING TO UPRR'S CROSS-COMPLAINT

UPRR filed a cross-claim against KAM and "K" Line based upon the following facts. In April of 2005, "K" Line and KAM caused a containerized shipment to be transported from Shanghai, China to Chicago,

Illinois via Long Beach, California which included steel injection molds (hereinafter, "steel molds") destined for the Plano Molding Company in Illinois The steel molds were stowed in container TRLU 2733410, which was placed on a UPRR train for shipment from Long Beach to Chicago. During transit near Tyrone, Oklahoma, the steel molds broke through the floor of container TRLU 2733410 causing the train to derail and resulting in significant damage to UPRR property.

At the time of the derailment, UPRR and KAM were parties to an August 1, 2003 contract (UPRR DER-UP-C-21300-A) entered into for the benefit of "K" Line, the disclosed principal of KAM. The contract specified that the rights and obligations thereunder are governed by the law of the State of New York.

> **"Section 26. CHOICE OF LAW. The law of the State of New York shall govern the performance and enforcement of the rights and obligations of the parties to this agreement."**

[T.D. Sheldon Decl. dated 7/31/06 at ¶ 2; UPRR DER-UP-C-21300-A, page 25, section 26 (emphasis added).][2]

UPRR DER-UP-C-21300-A further provided that liability for freight loss and damage to lading while under the control of UPRR shall be governed by UPRR's Master Intermodal Transportation Agreement ("MITA.") The MITA's definition of "Shipper" includes agents, employees, and independent contractors acting on behalf of the shipper, receiver, or

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[2] UPRR DER-UP-C-21300-A is by its terms confidential and is not therefore attached to the papers filed with the Court but it will be brought to the hearing on this motion should the Court wish to review its terms in camera.

beneficial owner. Under MITA, the Shipper bears sole responsibility for loading, blocking, and bracing the shipment, for ensuring that no more than 25,000 pounds are distributed in a container over ten linear feet. If the load shifts in a situation where the loading, blocking, or bracing of the shipment was insufficient, under MITA, the Shipper is responsible for all damages and expenses resulting therefrom. The Shipper likewise bears the sole responsibility for any spill, response, mitigation, cleanup or disposal due to Shipper's non-compliance with any local, state, or federal law or regulation as well as the terms and conditions in MITA. And the Shipper bears sole responsibility for any loss or damage due to any defects in privately owned or leased equipment under the MITA. [T.D. Sheldon Decl. dated 7/15/06 at ¶ 3; Exhibit.]

UPRR alleges herein that "K" Line and KAM breached express warranties to UPRR by failing to ensure that the steel molds were properly loaded; by failing to ensure the steel molds were properly blocked and braced; by failing to comply with relevant rules, regulations, and industry standards regarding the bracing and blocking of the molds; by failing to comply with relevant rules, regulations, and industry standards regarding cargo weight displacement; and by failing to use proper equipment in the shipment of goods pursuant to MITA, namely, in using a container which was substandard and defective. As a result, UPRR suffered over four million five hundred thousand dollars worth ($4,500,000.00) of losses including but not limited to damage to over thirty rail cars, track, lading, signal equipment, and other UPRR property, as well as other economic loss due to the

clean up costs associated with the derailment and lost productivity. New York law will apply to the rights and obligations of the cross-defendants and some if not all of the third party defendants in these consolidated actions.

IV. UPRR'S THIRD PARTY ACTION

UPRR also filed a third party complaint naming seven third party defendants all of whom are believed to have either participated in the loading or shipment of container TRLU 2733410-A as agents and independent contractors on behalf of the shipper, receiver or beneficial owner and who are, therefore, subject to New York law:

1) WORLD COMMERCE SERVICES, LLC. ("World") is believed to have acted as an intermediary for parties seeking to ship the steel molds in TRLU 2733410 overseas and arranged for the shipment under agency agreements. World issued its own non-vessel operating common carrier Bill of Lading related to the shipment of TRLU 2733410, which reflected Kunshan as the shipper and Plano as the ultimate consignee or recipient. [T.D. Sheldon Decl. dated 7/31/06 at ¶ 4a.]

2) WORLD COMMERCE SERVICES, INC. ("World, Inc."): World, Inc. is the "consignee" and "notify party" on the "K" LINE Waybill. World Inc. is believed to have assumed responsibility for the carriage of the steel molds under its Bill of Lading. World Inc. is believed to have acted as an agent of Kunshan in tendering the steel molds to KAM and "K" LINE for transportation. [T.D. Sheldon Decl. dated 7/31/06 at ¶ 4c.][3]

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[3] World Inc. may have recently merged into World Commerce Services, LLC. [McMurray Decl. dated 7/31/06 at ¶ 5.]

3) KUNSHAN YUANJIN PLASTIC & ELECTRONIC CO., LTD. ("KUNSHAN") is believed to have tendered the cargo of steel molds to "K" LINE for carriage overseas and was responsible, along with its agents and contractors, for the blocking, bracing storage and securement of the molds inside the container which carried the molds. [T.D. Sheldon Decl. dated 7/31/06 at ¶ 4c.]

4) THI GROUP, LTD. is also believed to have had a role in shipping the goods in container 2733410 and is believed to have acted as an agent for Plano Molding Company. [T.D. Sheldon Decl. dated 7/31/06 at ¶ 4d.]

5) PLANO MOLDING COMPANY is listed as the ultimate consignee or recipient on the Bill of Lading for container TRLU 2733410 which was issued by World. Plano is believed to have been the intended ultimate recipient of the steel molds and was responsible for the actions of its various agents: World, World Inc., THI, CMT and Kunshan. [T.D. Sheldon Decl. dated 7/31/06 at ¶ 4e.]

6) CMT INTERNATIONAL, INC.: UPRR is informed and believes that CMT contracted with Kunshan to fabricate the steel molds at its plant in China for forwarding through World and World, Inc., as well as KAM and "K" LINE to Plano. [T.D. Sheldon Decl. dated 7/31/06 ¶ 4f.]

7) SHANGHAI HAIXING YUANCHANG CONTAINER TRANSPORTATION CO., LTD. ("Shanghai") is believed to have performed the actual loading and stowing of the Steel Molds tendered for shipment by Kunshan. [T.D. Sheldon Decl. dated 7/31/06 at ¶ 4g.]

V. THE NEW YORK LAWSUITS

On the day on which these consolidated actions were removed to the Central District of California, two separate actions had already been pending in the Southern District of New York for nearly four months (with a collective amount in controversy of $325,273.56 sought by the plaintiffs) in connection with cargo damages stemming from the Tyrone derailment. There are nine suits currently pending in the Southern District of New York for recovery of cargo loss or damage stemming from the Tyrone derailment (hereafter "the New York Tyrone suits"):

1. *Indemnity Insurance Company of North America v. "K" Line, Union Pacific Railroad Company*, S.D.N.Y., 06 CIV 0615, filed on 1/25/06. Amount sought by plaintiff for cargo loss/damage: $ 269,852.56
2. *Royal & Sun Alliance Insurance v. "K" Line, Union Pacific Railroad Company*, S.D.N.Y., 06 CIV 2557 (US/BSJ) filed on 1/25/06. Amount sought by plaintiff for cargo loss/damage: $ 55,421.00.
3. *Mitsui Sumitomo v. "K" Line, Union Pacific Railroad Company*, S.D.N.Y., 06 CIV 2956 filed on 4/17/06. Amount sought by plaintiff for cargo loss/damage: $ 1,546,836.00.
4. *ACK Controls, Inc. v. "K" Line, Union Pacific Railroad Company*, S.D.N.Y., 06 CIV 3040 filed on 4/19/06. Amount sought by plaintiff for cargo loss/damage: $ 20,000.00.
5. *Philips PC Peripherals v. "K" Line, et al.*, S.D.N.Y., 06 CIV 2962 (Howell)[4] filed on 4/17/06.

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[4] UPRR is not yet named as a defendant in the *Phillips* matter.

Amount sought by plaintiff for cargo loss/damage: $ 221,708.89.

6. *Federal Insurance Co. v. "K" Line, Union Pacific Railroad Company*, S.D.N.Y., 06 CIV 3038 filed on 4/19/06. Amount sought by plaintiff for cargo loss/damage: $ 42,211.00.
7. *Navigators Management Co. v. "K" Line, Union Pacific Railroad Company*, S.D.N.Y., 06 CIV 3042 (BSJ) filed on 4/20/06. Amount sought by plaintiff for cargo loss/damage: $ 8,952.76.
8. *Snap-On Logistics v. "K" Line, Union Pacific Railroad Company*, S.D.N.Y., 06 CIV 3073 (LAP); filed on 4/21/06. Amount sought by plaintiff for cargo loss/damage: $ 28,000.00.
9. *Tokio Marine & Nichido Fire Ins. Co., Ltd., Fuji Photo Film Co., Ltd., Fuji Photo Film U.S.A., Inc. and Enovation Graphic Systems, Inc. et al. v. Union Pacific Railroad Company*, S.D.N.Y., 06 CIV 51519 (VA), filed 7/6/06. Amount sought by plaintiff for cargo loss/damage: $775,000.00.

Each of the defendants, cross-defendants and third party defendants which have appeared in the New York Tyrone suits are represented by the same respective counsel.[5]

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[5] The following counsel represent the parties in all nine of the New York Tyrone suits except that in three of the New York Tyrone suits, the plaintiffs are represented by different counsel. David L. Mazoroli (for plaintiffs) in five of the nine New York suits; John Kimball (for "K" Line and KAM) in all nine New York Suits: Barry Gutterman & and Robert Mooney (for UPRR) in all nine New York suits; Andrew S. Buchanan (For CMT) in all nine New York suits, R. James Jude De Rose III (for Plano Molding) in all nine New York Suits and James Nathan Wolf (for World Services, LLC) in all nine New York Suits. The other plaintiffs'

In California, there are only four consolidated Tyrone derailment related suits ("the California Tyrone suits.")[6] There are no other suits currently filed in any venue other than the Southern District of New York and the Central District of California. [Decl. of Barry N. Gutterman dated 7/31/06 at ¶ 5.]

UPRR's cross-complaints and third party complaints herein are modeled after and are virtually identical to those which had previously been filed in the New York Tyrone suits. [Decl. of Leslie G. McMurray ("LGM") dated 7/31/06 at ¶ 10.] Seven of the nine New York suits have been deemed related and it is anticipated that the remaining two will soon follow suit.[7] UPRR will shortly seek to coordinate and consolidate the New York cases before one judge to promote further judicial economy and convenience for the witnesses. [Decl. of Barry N. Gutterman dated 7/31/06 at ¶ 6.]

VI. 28 U.S.C. SECTION 1404(A)

Under 28 U.S.C. §1404(a), "For the convenience of the parties and witnesses, in the interests of justice, a district court may transfer any civil action to any other

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counsel are Lawrence Glynn (For Navigators Management Co.), McDermott & Radzik (for Philips PC Peripherals and Keith Dalen (for Snap-On Logistics and *Tokio Marine Nichido Fire Ins. Co., Ltd. et al.*). [Decl. of Barry N. Gutterman dated 7/31/06 at ¶ 4.]

[6] The four related cases currently before this Court are as follows: *Regal-Beloit v. UPRR et al.*, CV 06-3016 DSF (FMOx); *Victory Fireworks v. UPRR et al.*, CV 06-3017 DSF (FMOx); *Royal Sun v. UPRR et al.*, CV 06-3019 DSF (FMOx) and *PICC v. UPRR et al.*, CV 06-3018 DSF (FMOx).

[7] The exception being the Snap-On Logistics case which is expected to be deemed related in the near future. [Decl. of Barry N. Gutterman dated 7/31/06 at ¶ 6.]

district or division where it might have been brought." The District Court should consider three threshold questions: (1) Would the transferee court have subject matter jurisdiction over the case? (2) Would the defendants sued have been subject to personal jurisdiction? (3) Would venue be proper in the transferee district? *Hoffman v. Blaski*, 363 U.S. 335, 343-344, 80 S.Ct. 1084, 1089-1090 (1960).

> "[1404(a)] has been the subject of much litigation and several respected sources have called for its revision. *See Wright, Law of Federal Courts*, 2d Ed. (1970), § 44 at 170; 7 ALR Fed. 20. Most of the criticisms are directed at the 'where it might have been brought' phrase which many consider to be unnecessary in view of the broad scope of in personam jurisdiction and the requirement that a transfer be 'in the interests of justice.'."

A.J. Industries, Inc. v. United States District Court for the Central District of California, 503 F.2d 384 at 387 (9th Cir. 1974.)

Though 28 U.S.C. section 1404(a) expressly mentions only three factors, the court is not limited to those rather broad generalities, but may consider a myriad of other factors which are subsumed by the purpose of the statute. *SEC v. Page Airways, Inc.*, 464 F.Supp. 461, 463 (DC Dist. Col. 1978) citing to *Chicago, Rock Island and Pacific Railroad Company*, 220 F.2d 299 (7th Cir. 1955). Each case to be transferred must be evaluated on its own unique facts and among other factors to be considered are the relative congestion of calendars of the potential transferee and transferor courts, the relative ease of access to sources of proof, the availability of process to compel attendance of

unwilling witnesses, the cost of obtaining unwilling witnesses, the practical problems indicating where the case can be tried more expeditiously and inexpensively, and other practical aspects of expeditiously and conveniently conducting trial. *SEC v. Page Airways, Inc.*, 464 F.Supp. 461, 463 (DC Dist. Col. 1978); *Schneider v. Sears et al.*, 265 F.Supp. 257 at 263 (S.D.N.Y., 1967).

Importantly, although the Court will normally give a large measure of deference to the plaintiff's choice of forum,

> **"this factor has minimal value where none of the conduct complained of occurred in the forum selected by the plaintiff."**

Chicago, Rock Island and Pacific Railroad Company v. Igoe et al., 220 F.2d 299 at 304 (7th Cir. 1955)(emphasis added.) Moreover, plaintiff's selection of a forum will be given even less weight when the forum selected by the plaintiff is not his or her state of residence. As the complaints in these consolidated California Tyrone suits reveal, neither Regal-Beloit nor any of the plaintiffs in the four California Tyrone cases are citizens or residents of California (with the possible exception of Victory Fireworks).[8]

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[8] The plaintiffs' Complaints in the four related California Tyrone suits provide the following allegations about the plaintiffs' respective residences: Royal & Sunalliance - offices and place of business c/o Vericlaim in New York, New York (Complaint 1:23-25); Regal-Beloit - foreign corporation with office and principal place of business in Beloit, Wisconsin (Complaint 1:22-24); PICC - foreign insurance corporation with offices and principal place of business in Shanghai, China (Complaint 1:24-27);Victory Fireworks - doing business in the State of California with an office and place of business in Ellsworth, Wisconsin (Complaint 1:22-24).

And significantly for the transfer analysis in this particular case,

> "There is a strong policy favoring the litigation of related claims in the same tribunal in order that: (1) pretrial discovery can be conducted more efficiently; (2) the witnesses can be saved time and money, both with respect to pretrial and trial proceedings; (3) duplicitous litigation can be avoided, thereby eliminating unnecessary expense to the parties and at the time [sic] time serving the public interest; (4) inconsistent results can be avoided. (Footnote omitted.)

Schneider v. Sears, 265 F.Supp. 257, 266-267 (S.D.N.Y. 1967)(Denial of a motion to transfer was found an abuse of discretion.) The pendency of related actions in the transferee forum is a **significant factor** in considering the interest of justice factor. A.*J. Industries, Inc. v. United States District Court for the Central District of California*, 503 F.2d 384, 389 (9th Cir. 1974).

In the Ninth Circuit courts will transfer a case where either (1) the plaintiff's selection of a forum is so oppressive and vexatious to defendant as to be out of proportion to the plaintiff's convenience, which may be slight or nonexistent or (2) the trial in the chosen forum is inappropriate because of other considerations affecting court administration. *Paper Operations Consultants International, Ltd. v. SS Hong Kong Amber et al.*, 513 F.2d 667 at 669, n. 3 (9th Cir. 1975)(citing *Hoffman v. Goberman*, 420 F.2d 423, 426-7 (3rd Cir., 1970.)

The trial court's ruling on a motion to transfer will not be reversed on appeal absent an abuse of discretion and the appellate court will not substitute its judgment

for the trial court's. The determination of whether or not to transfer a case under 28 U.S.C. section 1404(a):

> "is entrusted to the sound discretion of the trial court. An appellate court may only reverse the decision of the district court if it constitutes an abuse of discretion. It is not the role of the appellate court to determine how it would have exercised its jurisdiction had the facts been presented to it. *The Belgenland*, 114 U.S. 355, 368, 29 L.Ed. 152, 5 S.Ct. 860 (1885). *The Kanto Maru*, 112 F.2d 564, 565 (9th Cir. 1940)..."

Paper Operations Consultants International, Ltd. v. SS Hong Kong Amver et al., 513 F.2d 667 at 670 (9th Cir. 1975).

> "Weighing of factors for and against transfer involves subtle considerations and is best left to the discretion of the trial judge."

Commodity Futures Trading Comm'n v. Savage, 611 F.2d 270, 279 (9th Cir. 1979). The factors in this case mandate transfer of these cases to New York.

VII. The Transferee Court Is One In Which the Action Might Have Been Brought

1. Subject Matter Jurisdiction

Plaintiff in this case brings claims which were removed unchallenged to this Court under federal question jurisdiction. Therefore, clearly the Southern District of New York would have the same federal question subject matter jurisdiction over this case.

2. Personal Jurisdiction

When considering where an action "might have been brought" the Court will look at the action "which existed when suit was instituted." *Hoffman v. Blaski*,

363 U.S. 335, 343-344, 80 S.Ct. 1084, 1089-1090 (1960)(emphasis added.) In this case, UPRR, "K" Line and KAM were the defendants sued by plaintiff. All three are subject to personal jurisdiction in New York.

UPRR has submitted to the jurisdiction of the Court in the Central District of New York in the New York Tyrone suits and will do so as well in connection with the California Tyrone suits once transferred. [Decl. of Barry N. Gutterman dated 7/31/06 at ¶ 4.] Defendants "K" LINE and KAM are subject to personal jurisdiction in New York. [McMurray Decl. dated 7/31/06 at ¶ 12, and exhibit I thereto, Answer of "K" Line and KAM to the cross-claim of UPRR in the New York Tyrone suit entitled *Indemnity Insurance Company of North America v. "K" Line, Union Pacific Railroad Company*, S.D.N.Y., 06CIV0615, page 2, ¶ 4.] UPRR, "K" Line and KAM, have all been sued in the Southern District of New York by other insurance companies and shippers in the nine New York Tyrone suits, have each appeared and have answered those nine complaints in the Southern District of New York and are currently litigating in the Southern District of New York the exact same issues which will arise in this case. [Decl. of Barry N. Gutterman dated 7/31/06 at ¶ 8.] Therefore, the complaint in this matter could have been filed in New York.

Importantly, **a suit "could have been brought" in a transferor forum under 28 U.S.C. section 1404(a) where an existing related action was already filed in the transferor forum by the same plaintiff as in the suit which the defendant sought to transfer.** *American Home Assurance Company v. Insular Underwriters Corporation*, 327 F.Supp. 717 at 719 (S.D.N.Y. 1971.) One of the plaintiffs in the related

California Tyrone suits (*Royal & Sun Alliance Insurance*) is also a plaintiff in one of the New York Tyrone suits. [Decl. of Barry N. Gutterman dated 7/31/06 at ¶ 9.] Thus, the transferee forum is certainly one in which these consolidated actions could originally have been brought.

Although the transfer analysis does not concern itself with the question of whether or not the plaintiff would have been subject to personal jurisdiction in the transferor court, it is notable that Regal-Beloit is itself subject to personal jurisdiction in the Southern District of New York. Regal-Beloit is a Wisconsin Corporation listed on the New York Stock Exchange which manufactures products including boat transmissions and which has a division called Velvet Drive located in New Jersey that specifically serves and distributes products in various East Coast states including New York. [McMurray Decl. dated 7/31/06 at ¶ 3 and Exhibit A thereto.] [9]

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[9] The other plaintiffs in the California Tyrone suits are also subject to jurisdiction in New York. Plaintiff Royal & Sunalliance merged with Travelers Property Casualty in September of 2003 and maintains an agent in Long Island City, New York and in New York, New York, and it also filed a separate but related suit concerning cargo loss due to the Tyrone derailment in the Southern District of New York. [McMurray Decl. dated 7/31/06 at ¶ 8, and exhibit G thereto.] Plaintiff PICC Property and Casualty Company Limited formally opened a representative office in New York in May of 2002. [McMurray Decl. dated 7/31/06 at ¶ 9, and exhibit H thereto.] Plaintiff Victory Fireworks is believed to use Vericlaim in New York as its agent for processing claims. [McMurray Decl. dated 7/31/06 at ¶ 9, and exhibit M thereto.] However, in any event a showing that the transferor court has personal jurisdiction over the plaintiffs is neither a requirement nor even a factor to consider on a motion to transfer under section 1404(a).

3. Personal Jurisdiction Over the Third Party Defendants Is Not a Dispositive Factor

All of the defendants named in UPRR's third party complaint are the same third parties which have been or will be[10] named in the nine third party complaints filed in the New York Tyrone suits. [Decl. of Barry N. Gutterman dated 7/31/06 at ¶ 10.] While their convenience may be considered in the balance of factors warranting transfer, whether or not the Southern District of New York has personal jurisdiction over these third party defendants is not a dispositive factor on a motion to transfer under 28 U.S.C. section 1404(a). *Probatter Sports, LLC v. Southamton Sports Zone*, 2003 U.S. Dist. LEXIS 18406 at *5.

> "The existence of a potential third party defendant or witness not subject to this Court's jurisdiction is certainly a factor to consider, but is not necessarily dispositive."

Id.

Third party defendants WORLD COMMERCE SERVICES, LLC. and WORLD COMMERCE SERVICES, INC. desire that these consolidated cases be transferred to New York. [McMurray Decl. dated 7/31/06 at ¶ 20.] They have designated an agent for service of process in New York and have appeared in the New York Tyrone suits without challenging jurisdiction in the Southern District of New York. [Decl. of Barry N. Gutterman dated 7/31/06 at ¶ 12.] WORLD COMMERCE SERVICES, LLC. also

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[10] Third party Shanghai Haixing is absent from the *Indemnity Insurance* case to date but will be added shortly as a third party by amendment.

maintains an office in Rosedale, New York. [McMurray Decl. dated 7/31/06 at ¶ 4, and exhibit B thereto.]

Third party defendant CMT INTERNATIONAL, INC. is a corporation located in the Southern Illinois. It has appeared in the New York action and has filed a motion to be dismissed from the New York Tyrone suits claiming that the New York court has no personal jurisdiction over it. However, counsel for CMT has also indicated to counsel for UPRR in the California Tyrone suits that CMT is planning to bring a motion to be dismissed from this suit based on lack of jurisdiction in California. [McMurray Decl. dated 7/31/06 at ¶ 6.] CMT claims that neither forum has jurisdiction over it. Whatever the outcome of either of the motions to dismiss CMT, it cannot be said that California would be the more convenient forum for CMT to litigate in. In fact, California is an additional 936 miles further away from CMT's corporate headquarters than the Southern District of New York. [McMurray Decl. dated 7/31/06 at ¶ 6; exhibit D.] In any event it appears that the New York Courts do have jurisdiction over CMT by virtue of the fact that CMT is affiliated with third-party defendant Kunshan Yuanjin Plastic & Electronic Co., Ltd. and both are part of a large group of companies known as the En Jinn Group. En Jinn is a multinational corporation with headquarters in Taiwan. [McMurray Decl. dated 7/31/06 at ¶¶ 15-18 and exhibits N - P thereto.]

Third party defendant Plano Molding Company is a corporation located in Plano, Texas. [McMurray Decl. dated 7/31/06 at ¶ 7; exhibit E.] Plano Molding Company has also brought a motion to dismiss for lack of personal jurisdiction in the New York forum and has

also indicated to UPRR's counsel in this case that it intends to move this Court to dismiss it from these consolidated actions on the basis of lack of jurisdiction. Plano claims that neither forum has jurisdiction over it. Whatever the outcome of the motion to dismiss Plano, it cannot be said that California would be the more convenient forum for Plano to litigate in. Moreover, California is 1,149 additional miles further away from Plano Molding's corporate headquarters than the Southern District of New York so that New York is the more convenient forum for Plano vis-a-vis California. [McMurray Decl. dated 7/31/06 at ¶ 7; Exhibit F.]

Nor can it be said that New York has no jurisdiction over Plano. In fact, Plano Molding Company has a division called Plano Tackle Systems which has a retailer (Sports Authority) which carries Plano's products in Manhattan, New York. [McMurray Decl. dated 7/31/06 at ¶ 7, and exhibit E thereto.] Plano's products are also sold in New York at the Wal-Mart on Long Island just 15 miles from the courthouse of the Southern District of New York. Plano also markets its products nationally through its website, directing customers to retailers within New York, Plano's products are sold in New York and retailers and mass-retailers sell Plano's products throughout the United States, including in stores in New York, and thus Plano receives revenue from sales in New York. [See Exhibit B (Siroky Aff.) to paragraph 13 of the Decl. of Barry N. Gutterman dated 7/31/06.] Plano's retailers make Plano products available on line for New York customers which are then sent to these customers in New York. *Id.* Plano concedes that it has three divisions which have sales representatives whose

territories cover New York and that these three divisions of Plano have managers who may call on any customer in New York once or twice a year at which time Plano's sales employee will present a Plano product, its pricing and the Plano sales program to the buyer of a specific category of retail product. (Siroky Aff., ¶ 20.) Plano concedes that it receives income from sales in New York. (Siroky Aff., ¶ 25.) Plano also maintains a relationship with G. Hirschfeldt Co., L.L.C., a New York Corporation with an office in New York, who functions as a sales represenative for Plano by acting as an international consolidator. (Siroky Aff., ¶ 26.) G. Hirschfeldt purchases product from Plano which it resells internationally. G. Hirschfeldt solicits orders from international customers out of its New York offices. (Siroky Aff., ¶ 27.)

On its website, Plano directs customers and retailers nationwide, including within New York. Selling products to a national market puts a manufacturer on notice that its act of selling within the national market will have consequences in New York. *Bean Dredging Corporation et al. v. Rogers-Olympic Corporation*, 744 F.2d 1081 at 1084-85 (5th Cir. 1984).

Three of the third party defendants named in this suit (and named in the New York Tyrone suits) are Chinese entities. UPRR has commenced the rather cumbersome process of serving process on those entities (KUNSHAN YUANJIN PLASTIC & ELECTRONIC CO., LTD., THI GROUP, LTD., and SHANGHAI HAIXING YUANCHANG CONTAINER TRANSPORTATION CO., LTD.) [McMurray Decl. dated 7/31/06 at ¶ 13.] It is anticipated that it may take three to six months to effectuate service on the Chinese entities. [Id.]

Presumably the Chinese entities would argue that litigating in either New York or California would be inconvenient. Therefore, the convenience of those third party defendants does not tip the scale in either direction in the transfer analysis. In any event, whether the court has personal jurisdiction over third party defendants **is not a dispositive factor in the transfer analysis.** The weightier factors in the transfer analysis all militate in favor of transfer of these California Tyrone cases to the Southern District of New York.

4. Venue is proper in the Southern District of New York

For purposes of transfer, the court looks only at whether the action could have been filed in the Southern District of New York as it existed at the time of the filing in California. *Hoffman v. Blaski*, 363 U.S. 335, 343-344, 80 S.Ct. 1084, 1089-1090 (1960). The Court therefore does not consider for venue purposes, the third party defendants which UPRR has brought into the suit after the original complaint was filed.

Under 28 U.S.C. section 1391(b), the federal "general venue" provision, in any action in which jurisdiction is not based solely on diversity, the action may be brought in (1) a judicial district where any defendant resides if all defendants reside in the same state. The term "resides" in this context is synonymous to where defendants are subject to personal jurisdiction. *Arley v. United Pacific Ins. Co.*, 379 F.2d 183, 185 (9th Cir. 1967).

> "For purposes of venue....a defendant that is a corporation shall be deemed to reside in any judicial district in which it is subject to

> personal jurisdiction at the time the action is commenced...."

28 U.S.C. section 1391(c).

In this case, as demonstrated above, all three defendants sued by plaintiff herein (UPRR, "K" Line and KAM) are subject to personal jurisdiction in New York. Therefore, venue is proper in the Southern District of New York.

VIII. THE CONVENIENCE OF PARTIES AND WITNESSES AND INTERESTS OF JUSTICE MANDATE TRANSFER TO NEW YORK

A. Transfer Will Eliminate Duplicative Litigation

In considering a transfer motion, the Court should consider whether transfer will avoid duplicative litigation, effect judicial economy and prevent waste of time and money. *Schneider v. Sears*, 265 F.Supp. 257, 266-267 (S.D.N.Y. 1967).

> "There is a strong policy favoring the litigation of related claims in the same tribunal..."

Schneider v. Sears, 265 F.Supp. 257, 266-267 (S.D.N.Y. 1967).

The federal judicial system will be grossly and unnecessarily overburdened if the exact same issues in the Tyrone suits are tried simultaneously in two courts on opposite sides of the United States. The same issues which will necessarily arise in the courts in both California and New York include:

1) UPRR's liability, if any, for the derailment;

2) UPRR's handling of the post derailment transfer, transloading and/or disposal of containers involved in the derailment;

3) The extent and value of UPRR's property damage caused by the derailment;

4) Liability of cross-defendants in causing or contributing to the derailment;

5) Liability of third party defendants in causing or contributing to the derailment;

6) UPRR's right to recover against "K" Line;

7) UPRR's right to recover against KAM;

8) UPRR's right to recover against each of the seven third party defendants.

9) UPRR's entitlement to package limitations and other defenses in the "K" Line / KAM bills of lading.

Without transfer, two courts in two states would be burdened with marshaling the discovery process, hearing discovery motions, ruling on dispositive motions, managing pre-trial proceedings, conducting settlement conferences and ultimately, bringing the same witnesses to two courts, once in California and once in New York. Clearly having all thirteen of the cases tried in the same forum would result in discovery, pretrial and trial proceedings which are far more expeditious and cost effective for all involved. Without transfer, willing witnesses would have to travel to and attend hearings and depositions in both California and New York. Unwilling witnesses would be compelled to come to these two states to give the exact same testimony.

B. Transfer will Eliminate the Risk of Inconsistent Adjudications of Fact and Law and Inconsistent Verdicts

Litigation in two states simultaneously subjects the parties to the risk of inconsistent adjudications of identical questions of fact or law and to the risk of

inconsistent verdicts. In related cases in different forums, this is a particularly onerous risk that can be eliminated by transferring the related cases into one single forum. *Schneider v. Sears*, 265 F.Supp. 257, 266-267 (S.D.N.Y. 1967).

C. The Southern District of New York Is Given Priority

Under section 1404(a), a bright line rule is applied giving priority to the court wherein the first of two or more related actions was filed (i.e., the "first filed" rule.) *Midwest Motor Express Inc., et al. v. Central States Southeast and Southwest Areas Pension Fund*, 70 F.3d 1014 at 1017 (8th Cir. 1995) *cert. denied*, 517 U.S. 1203; 116 S.Ct. 1704; 134 L.Ed.2d 803 (1996). In *Midwest Motor Express, Inc.*, the Court of Appeal upheld the district court's transfer of a case based on the "first filed" rule stating:

> "We affirm the district court and it decision to transfer this case based upon the "first-filed" rule. This rule gives priority for purposes of choosing among possible venues when parallel litigation has been instituted in separate courts, to the party who first establishes jurisdiction." *Northwest Airlines, Inv. v. American Airlines, Inc.*, 989 F.2d 1002, 1006 (8th Cir. 1993)."

Midwest Motor Express Inc., supra, 70 F.3d at 1017.

In this case, the Southern District of New York is given priority over the Central District of California by virtue of the fact that the Southern District of New York first obtained jurisdiction over two Tyrone derailment suits nearly four months before the Central District of California obtained jurisdiction over its first Tyrone suit. The first two New York Tyrone suits

were filed on January 25, 2006, nearly three months before this suit was filed in state court in California and nearly four months before this suit was removed to federal court (in mid-May of 2006). [Decl. of Barry N. Gutterman dated 7/31/06 at ¶ 3.] The "first filed" rule mandates transfer, of this consolidated case to the Southern District of New York.

D. There Is No Nexus to this Case and the Central District of California

Plaintiffs' case concerns cargo damage occurring in Oklahoma. UPRR's cross-claims and third party complaints concern property damage occurring in Oklahoma. This case involves no California law. There are no known witnesses residing within the Central District of California. There is no reason whatsoever to give any priority to the Central District of California other than the mere fact that the plaintiff selected California as its forum. And that fact is given minimal weight when, as here, none of the events at issue occurred in the transferor state, *Chicago, Rock Island and Pacific Railroad Company v. Igoe et al.*, 220 F.2d 299 at 304 (7th Cir. 1955), and where, as here, plaintiff does not reside in the transferor state.

> "...[W]hen the plaintiff chooses a forum which has no connection to himself or the subject matter of the suit, and is thus not his "home turf," the burden on the defendant is reduced and it is easier for the defendant to show that the balance of convenience favors transfer."

Chrysler Capital Corporation et al. v. Woehling, 663 F.Supp. 478 at 482 (D. Del. 1987); *accord Amazon.com v. Cendant Corp.*, 404 F.Supp.2d 1256 at 1260 (W.D. WA 2005).

None of the percipient witnesses to the derailment are believed to be located within California, witnesses regarding the damages and damages calculations incurred by plaintiff and by UPRR are believed to be located outside of California. Tangible evidence relating to the derailment including the steel molds and the container are all located outside of California. [T.D. Sheldon Decl. dated 7/31/06 at ¶ 4.] Accordingly, all of the depositions of percipient witnesses are likely to be taken outside of California. California has no nexus whatsoever to the derailment, the property damage, the law to be applied, nor any of the issues before this Court, other than the mere fact that plaintiff herein filed its action here. The Central District of California has no interest in the resolution of these consolidated actions. Where the forum lacks any significant contact with the activities alleged in the complaint, the plaintiff's choice of forum will be given considerably less weight. *Chrysler Capital Corp. v. Woehling*, 663 F.Supp. 478, 482 (D.DE 1987).

The Southern District of New York has a far greater interest in the resolution of this case. Twelve plaintiffs in the nine New York Tyrone suits each selected New York as their forum of choice. At least one of the plaintiff's in the California Tyrone suits is also a plaintiff in one of the New York Tyrone suits (Royal & Sunalliance Co.)[11] Two of the plaintiffs in the New York Tyrone suits (Fuji Photo Film, U.S.A., Inc. and Enovation Graphic Systems, Inc. maintain offices in New York.) [Decl. of Barry N. Gutterman dated 7/31/06 at ¶ 9.]

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[11] The Royal & Sun case in New York is for recovery by the plaintiffs of $ 55,421.00 versus the $3,012.00 at issue in Royal & Sun's California suit.

Importantly, New York law will govern the resolution of many of the critical issues in this case. In *Paper Operations Consultants International, Ltd. v. SS Hong Kong Amber et al.*, 513 F.2d 667 at 670 (9th Cir. 1975), the Ninth Circuit examined an argument that the Northern District of California was a forum non conveniens in a cargo loss case. In determining to transfer the matter outside of California, the Court held that Vancouver was the more appropriate forum in part because Canadian law would govern the issues in the case.

In this case, New York law factors heavily into the Tyrone cases. First, New York law will govern resolution of the rights and obligations of UPRR, "K" Line, KAM, the consignee, the receiver and beneficial owner and their agents and contractors under UPRR DER-UP-C-21300-A.

Second, Transamerica ICS, the entity which entered into the Master Lease Agreement with "K" Line for the lease of the container which the molds broke through, fouling the tracks and resulting in the derailment, is located at 522 Fifth Avenue, New York, New York 10036. [T.D. Sheldon Decl. dated 7/31/06 at ¶ 6; and See Exhibit B, Master Lease Agreement at page 2, para. 22.]

Paragraph 22 of that Master Lease Agreement states that ICS and "K" Line have agreed that any claim or controversy relating to the lease **can only be filed in the federal or state courts in New York**. A contract provision designating the forum in which a dispute is to be heard is a "**significant factor**" in § 1404(a) determinations. *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 29-30, 108 S.Ct. 2239, 2244, 101 L.Ed.2d 22(1988).

K Line has designated CT Corporation in New York as its agent for accepting service of process within New York in connection with the Master Lease Agreement. And the Master Lease Agreement expressly states that,

> **"This Agreement shall be governed by the laws of the State of New York, U.S.A."**

[T.D. Sheldon Decl. dated 7/31/06 at ¶ 6; and See Exhibit B, Master Lease Agreement at page 2, paragraph 22 (emphasis added.)] Thus New York law may be applied to resolve issues relating to responsibility for the container which the molds broke through.

Third, a Service Contract between "K" Line and World Commerce Services LLC was also in place at the time of the shipments at issue. That contract concerns bill of lading provisions, shipping volumes. It contains damages provisions which provide as follows:

> **"DISPUTES/APPLICABLE LAW**
>
> **The substantive law of the State of New York shall govern this Contract and the parties submit to the jurisdiction of the U.S. District Court for the Southern District of New York for all purposes."**

[T.D. Sheldon Decl. dated 7/31/06 at ¶ 7; and See Exhibit C, Service Contract between "K" Line and World Commerce Services, LLC at page KL-231, clause XII, (emphasis added.)]

Thus while California has no interest in the resolution of this case, New York has numerous weighty interests in the resolution of the issues in all of the thirteen Tyrone suits.

E. The Amounts in Controversy Are Greater In New York

The combined amount in controversy of all of the plaintiffs' alleged cargo loss claims in the New York Tyrone suits totals $2,912,561.00. [Decl. of Barry N. Gutterman dated 7/31/06 at ¶ 7.] In stark contrast, combining all of plaintiff's claimed damages in the four California suits only amounts to $156,429.77. [McMurray Decl. dated 7/31/06 at ¶ 2.] As between New York and California, the plaintiffs in New York (which selected New York as their forum of choice) have by far the higher amounts in controversy.

F. The Location of Witnesses Mandate Transfer

The parties have disclosed extensive witness lists to date in this case and have filed them with the Court. Using the filed witness list as a guide, the witnesses (other than counsel) disclosed on that list are located in the geographical locations set forth below. The list below evidences the fact that the majority of witnesses reside in states which are substantially closer to New York than they are to California.

Witnesses' Residence	Witnesses
Indiana	1 witness
Wisconsin	1 witness
Illinois	5 witnesses
New York	1 witness
Virginia	5 witnesses
China	4 witnesses
Kansas	3 witnesses
Nebraska	7 witnesses
Texas	5 witnesses
Missouri	4 witnesses

[Decl. of LGM dated 7/31/06 at ¶ 4.] New York is a more convenient location for these witnesses to attend trial than California.

G. Both the Central District of California and the Southern District of New York Are Busy Forums But the Southern District of New York Has More Judges

The Central District of California is the largest district by population of all of the federal districts, since it encompasses practically all of the Los Angeles metropolitan area, while the City of New York is divided between the Southern and Eastern Districts of New York, and many New York suburbs are covered by district courts in New Jersey and Connecticut. Along with the Northern District of Illinois, these three courts have the most judges, personnel and facilities and publish the largest portion of opinions reported in the Federal Supplement. [See Exhibit K to the Decl. of LGM dated 7/31/06.] The Southern District of New York has 45 active sitting judges as of 2006 whereas the Central District of California has only 33 active sitting judges as of 2006. [See Exhibit L to the Decl. of LGM dated 7/31/06 (excerpts from the United States District Courts' official websites.).] Thus the Southern District of New York is better equipped to provide a speedier trial to the parties to the thirteen Tyrone derailment suits.

H. The Probability of Consolidation In New York Warrants Transfer

UPRR will seek to coordinate and consolidate the New York Cases before one judge to promote further judicial economy and convenience for the witnesses. [Decl. of Barry N. Gutterman dated 7/31/06 at ¶ 6.]

> "The feasibility of consolidation is a significant factor in the transfer decision, *Van Dusen v. Barrack*, 376 U.S. 612, 11 L.Ed. 2d 945, 84 S.Ct. 805 (1964), although even the pendency of an action in another district is important because of the positive effects it might have in possible consolidation of discovery and convenience to witnesses and parties. *Schneider v. Sears*, 265 F.Supp. 257 (1967); *Rogers v. Northwest Airlines, Inc.*, 202 F.Supp. 309 (1962)."

A.J. Industries, Inc. v. United States District Court for the Central District of California, 503 F.2d 384 at 389 (9th Cir. 1974). The fact that the thirteen actions, upon transfer, will be in the same court, and that UPRR will seek to coordinate all thirteen of the actions is an important factor warranting transfer of this consolidated case to the Southern District of New York.

I. Removal of this Case Does Not Affect Transfer

The fact that this case was originally venued in California state court then removed to the Central District of California does not affect UPRR's right to seek transfer of this matter to the Southern District of New York. *Piekarski v. Home Owners Sav. Bank*, 743 F.Supp. 38 at 43 (D.DC. 1990).

IX. CONCLUSION

This Court has the discretion to transfer these cases to the Southern District of New York. Judicial economy and the interests of the parties and witnesses will be served if all thirteen cases are resolved in one forum. The Southern District of New York first obtained jurisdiction over the cases giving it priority. New York law governs three key contracts affecting

the parties. New York has the stronger interest in resolution of these cases than California, which has no nexus to this case. The nine New York suits have the highest dollar amount in controversy. Plaintiff's choice of forum is not entitled to much weight when none of the events occurred in California, none of the affected property is located in California and plaintiff does not reside in California. The factors mandate transfer to New York.

Respectfully submitted.

Dated: August 17, 2006

LAW OFFICES OF LESLIE G. MCMURRAY

BY: s/Leslie G. McMurray
LESLIE G. MCMURRAY
Counsel for UNION PACIFIC RAILWAY COMPANY

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Attorneys for Defendant
UNION PACIFIC RAILROAD COMPANY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

REGAL-BELOIT CORPORATION	)	CV 06 3016 DSF (FMOx)
Plaintiff,	)	[(CONSOLIDATED WITH CV 06 3017 DSF (FMOx); CV 06 3018 DSF (FMOx); CV 06 3019 DSF (FMOx)]
vs.	)	
KAWASAKI KISEN KAISHA, LTD.; "K" Line AMERICA, INC.; UNION PACIFIC RAILROAD COMPANY; BURLINGTON NORTHERN AND SANTA FE RAILWAY and DOES 1 through 20, inclusive	)	[Assigned to Hon. Judge Dale S. Fischer]
Defendants.	)	**DECLARATION OF BARRY N. GUTTERMAN AND EXHIBITS THERETO IN SUPPORT OF UNION PACIFIC RAILROAD COMPANY'S NOTICE OF MOTION AND MOTION TO**

UNION PACIFIC RAILROAD COMPANY, Cross-complainant, vs. KAWASAKI KISEN KAISHA, LTD.; "K" Line AMERICA, INC., AND ROES 1 through 5, inclusive, Cross-defendants. And related third party complaint.	)	**TRANSFER TO THE SOUTHERN DISTRICT OF NEW YORK PURSUANT TO 28 U.S.C. SECTION 1404(a)** DATE: September 18, 2006 TIME: 1:30 P.M. PLACE: Courtroom 840 (Roybal Building)

DECLARATION OF BARRY N. GUTTERMAN

I, the undersigned, declare the following to be true and correct and known to me personally except for those matters stated on information and belief and as to those matters, I believe them to be true:

1. I am counsel of record for the Union Pacific Railroad Company in nine suits which are currently filed in United States District Court in the Southern District of New York. I make this declaration in support of Union Pacific Railroad Company's motion to transfer the above captioned case (and the three related cases) to the Southern District of New York.

2. Two federal cases filed against Defendant Union Pacific Railroad Company (hereafter "UPRR"), Defendant "K" Line America, Inc. (hereinafter,

"KAM") and Defendant Kawasaki Kisen Kaisha, Ltd. (hereinafter, "K" Line") were pending in the Southern District of New York since January 25, 2006 (with a collective amount in controversy of $325,273.56 sought by the plaintiffs) in connection with cargo damages stemming from the Tyrone derailment. These first two Tyrone derailment suits were filed nearly four months before the above captioned suit was removed to the Central District of California (on or about May 17, 2006.)

3. There are currently nine suits pending in the Southern District of New York wherein plaintiffs are alleging their entitlement to a recovery for cargo losses or damage arising from the Tyrone derailment (hereafter "the New York Tyrone suits.") The nine New York Tyrone cases are identified below as follows:

a. *Indemnity Insurance Company of North America v. "K" Line, Union Pacific Railroad Company*, S.D.N.Y., 06CIV0615, filed on 1/25/06. Amount sought by plaintiff for cargo loss/damage: $ 269,852.56.

b. *Royal & Sun Alliance Insurance v. "K" Line, Union Pacific Railroad Company*, S.D.N.Y., CV 2557 (US/NSJ) filed on 1/25/06. Amount sought by plaintiff for cargo loss/damage: $ 55,421.00.

c. *Mitsui Sumitomo v. "K" Line, Union Pacific Railroad Company*, S.D.N.Y., 06 CV 2956 filed on 4/17/06. Amount sought by plaintiff for cargo loss/damage: $ 1,546,836.00.

d. *ACK Controls, Inc. v. "K" Line, Union Pacific Railroad Company*, S.D.N.Y., 06CIV 3040 filed on 4/19/06. Amount sought by plaintiff for cargo loss/damage: $ 20,000.00.

e. *Philips PC Peripherals v. "K" Line, et al.*, S.D.N.Y., 06 CIV 2962 (Howell)[1] filed on 4/17/06. Amount sought by plaintiff for cargo loss/damage: $ 221,708.89.

f. *Federal Insurance Co. v. "K" Line, Union Pacific Railroad Company*, S.D.N.Y., 06 CIV 3038 filed on 4/19/06. Amount sought by plaintiff for cargo loss/damage: $ 42,211.00.

g. *Navigators Management Co. v. "K" Line, Union Pacific Railroad Company*, S.D.N.Y., 06 CV 3042 (BSJ) filed on 4/20/06. Amount sought by plaintiff for cargo loss/damage: $ 8,952.76.

h. *Snap-On Logistics v. "K" Line, Union Pacific Railroad Company*, S.D.N.Y., 06 CIV 3073 (LAP); filed on 4/21/06. Amount sought by plaintiff for cargo loss/damage: $ 28,000,00.

i. *Tokio Marine & Nichido Fire Ins. Co., Ltd. et al. v. Union Pacific Railroad Company*, S.D.N.Y., 06 CV 51519 (VA), filed 7/6/06. Amount sought by plaintiff for cargo loss/damage: $775,000.00.

4. The three defendants named by plaintiffs in the New York Tyrone cases are Union Pacific Railroad Company ("UPRR"), "K" Line America, Inc. (hereinafter, "KAM") and Kawasaki Kisen Kaisha, Ltd. (hereinafter, "K" Line.") Each of the defendants, cross-defendants and third party defendants which have appeared in the New York Tyrone suits are represented by the same respective counsel. The following counsel represent the parties in the New York Tyrone suits:

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[1] UPRR is not yet named as a defendant in the *Phillips* matter.

David L. Mazoroli (for plaintiffs) in five of the nine New York suits;

John Kimball (for "K" Line and KAM) in all nine New York suits;

Barry Gutterman, Robert Mooney (for UPRR) in all nine New York suits;

Andrew S. Buchanan (For CMT) in all nine New York suits;

R. James Jude De Rose III (for Plano Molding) in all nine New York suits;

James Nathan Wolf (for World Services, LLC) in all nine New York Suits.

Lawrence Glynn (For Navigators Management Co.);

McDermott & Radzik (for Philips PC Peripherals, Tokio Marine & Nichido Fire Insurance Co., Ltd., Fuji Photo Film Co., Ltd., Fuji Photo Film USA, Inc., and Enovation Graphic Systems, Inc.);

Keith Dalen (for Snap-On Logistics).

5. Other than the nine New York Tyrone suits and the four California Tyrone suits and, there are no other suits relating to cargo loss or damage claims known to be currently filed in any venue.

6. Seven of the nine New York Tyrone suits have been deemed related. It is anticipated that the remaining two (brought by Snap-On Logistics and by Tokio Marine) will be deemed related. UPRR will seek to coordinate the New York cases before one judge and to consolidate the cases to promote further judicial economy and convenience for the witnesses.

7. The combined amount in controversy of all of the plaintiffs' alleged cargo loss claims in the New York

Tyrone suits totals $2,912,561.00.

8. UPRR, K-Line and KAM have all appeared and have answered the complaints filed in the Southern District of New York and are currently litigating in that district the exact same issues which will arise in the above captioned case in terms of liability for the derailment.

9. One of the plaintiffs in the related California suit (*Royal & Sun. Alliance Insurance*) is also a plaintiff in one of the New York Tyrone suits. And according to their Complaint, two of the plaintiffs in the New York Tyrone suits (Fuji Photo Film, U.S.A., Inc. and Enovation Graphic Systems, Inc. have offices in New York) with Fuji Photo Film, U.S.A., Inc. being a New York Corporation. Exhibit A is a true and correct copy of the Complaint in that Tokio Marine suit. See page 1, ¶¶ 4 and 5 to see the plaintiffs' averments regarding their New York offices.

10. All of the defendants named in UPRR's third party complaint are the same third parties which have been or will be[2] named in the nine third party complaints filed in the New York Tyrone suits.

11. Union Pacific has submitted to the jurisdiction of the Court in the Central District of New York in the New York Tyrone suits and will do so as well in connection with the California Tyrone suits once transferred.

12. Third party defendants WORLD COMMERCE SERVICES, LLC. and WORLD COMMERCE SERVICES, INC. have designated an

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[2] Third party Shanghai Haixing is absent from the *Indemnity Insurance* case to date but will be added shortly as a third party by amendment.

agent for service of process in New York and have appeared in the New York Tyrone suits without challenging jurisdiction in the Southern District of New York.

13. Third Party Defendant Plano Molding Company ("Plano") is also a third party defendant in the nine New York Tyrone suits. Plano has brought a motion to dismiss in one of those suits based in part on the allegation that the United States District Court in the Southern District of New York has no jurisdiction over Plano. I am one of the counsel of record opposing Plano's motion to dismiss and have reviewed Plano's opposition papers and the affidavit of Lisa Siroky submitted by Plano in support of its motion. Attached hereto as Exhibit B, a true and correct copy of the affidavit of Lisa Siroky, an employee of Plano, dated May 1, 2006 which Plano submitted with its papers in the New York Tyrone suit brought by *Indemnity Insurance Company*. Based on the statements made by Siroky in her affidavit, I am informed and believe that the following facts are true:

a) Plano has three divisions which have sales representatives whose territories cover New York and that these three divisions of Plano have managers who call on customers in New York once or twice a year at which time Plano's sales employee will present the customer with a Plano product, its pricing and the Plano sales program. (See Siroky Aff., at ¶ 20.)

b) Plano receives income from sales in New York. (See Siroky Aff., ¶ 25.)

c) G. Hirschfeldt Co., L.L.C., a New York Corporation with an office in New York, functions as a sales representative for Plano by acting as an international consolidator. (Siroky Aff., ¶ 26.) G.

Hirschfeldt purchases product from Plano which it resells internationally. G. Hirschfeldt solicits orders from international customers out of its New York offices. (Siroky Aff., ¶ 27.)

Plano's products are sold in New York at the Wal-Mart on Long Island just 15 miles from the courthouse of the Southern District of New York. Plano markets its products nationally through its website, directing customers to retailers within New York, Plano's products are sold in New York and retailers and mass-retailers sell Plano's products throughout the United States, including in stores in New York. Plano receives revenue from sales of its products in New York. On its website, Plano directs customers and retailers nationwide, including within New York.

14. Third Party Defendant CMT International, Inc. ("CMT") is also a third party defendant in the nine New York Tyrone suits. CMT has brought a motion to dismiss in one of those suits based in part on the allegation that the United States District Court in the Southern District of New York has no jurisdiction over CMT.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct and if called to testify thereto I would and could do so competently in a court of law. Sworn to this 31st day of July in New York, New York.

s/Barry N. Gutterman
Barry N. Gutterman

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KAWASAKI KISEN KAISHA, LTD. and
"K" LINE AMERICA, INC.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

REGAL-BELOIT CORPORATION,	) CASE NO. CV 06-3016 DSF (FMOx)
Plaintiff,	) AND
vs.	) CONSOLIDATED ACTIONS: CV 06-3017, CV- 06-3018 and CV 06-3019
KAWASAKI KISEN KAISHA, LTD.; K-LINE AMERICA, INC.; UNION PACIFIC RAILROAD COMPANY; BURLINGTON NORTHERN AND SANTA FE RAILWAY and DOES through 20 , inclusive,	) **DECLARATION OF SHERRY JOHNSON IN SUPPORT OF DEFENDANTS KAWASAKI KISEN KAISHA, LTD.'S AND "K" LINE AMERICA, INC.'S MOTION TO DISMISS PURSUANT TO THE**
Defendants.	)
AND RELATED CROSS	)

CLAIMS AND THIRD PARTY COMPLAINT	**TOKYO DISTRICT COURT FORUM SELECTION CLAUSE IN THE BILL OF LADING**
VICTORY FIREWORKS, INC., Plaintiff, vs. KAWASAKI KISEN KAISHA, LTD.; K-LINE AMERICA, INC.; UNION PACIFIC RAILROAD COMPANY; BURLINGTON NORTHERN AND SANTA FE RAILWAY; and DOES 1 through 20 , inclusive, Defendants.	Hearing Date: Sept. 18, 2006 Time: 1:30 P.M. Courtroom: 840 Roybal Federal Building Honorable Dale S. Fischer
AND RELATED CROSS CLAIMS AND THIRD PARTY COMPLAINT	
PICC PROPERTY & CASUALTY COMPANY LIMITED SHANGHAI BRANCH, Plaintiff, vs. KAWASAKI KISEN KAISHA, LTD.; K-LINE AMERICA, INC.	

UNION PACIFIC RAILROAD COMPANY; BURLINGTON NORTHERN AND SANTA FE RAILWAY; and DOES 1 through 2 , inclusive,	)
Defendants.	)
AND RELATED CROSS CLAIMS AND THIRD PARTY COMPLAINT	).
ROYAL & SUN ALLIANCE INSURANCE CO., LTD.,	)
Plaintiff,	)
vs.	)
KAWASAKI KISEN KAISHA, LTD.; K-LINE AMERICA, INC.; UNION PACIFIC RAILROAD COMPANY; BURLINGTON NORTHERN AND SANTA FE RAILWAY; and DOES 1 through 20 , inclusive,	)
Defendants.	)
AND RELATED CROSS CLAIMS AND THIRD PARTY COMPLAINT.	)

DECLARATION OF SHERRY JOHNSON

I, Sherry Johnson, declare as follows:

1. I am the Assistant Manager of Compliance of "K" Line America, Inc. (hereinafter "KAM") in their office at 8730 Stony Point Parkway, Suite 400, Richmond, Virginia.

2. I make this Declaration on behalf of Kawasaki Kisen Kaisha, Ltd.(hereinafter "K" Line) and KAM in support of their motion to dismiss pursuant to the Tokyo District Court forum selection clause in the "K" Line bill of lading. I have personal knowledge of the facts set forth in this Declaration and for those facts stated to be on information and belief, I believe them to be true and correct. If called upon as a witness, I could and would competently testify thereto.

3. I have been employed as the Assistant Manager of Compliance of KAM for 8 years. In my capacity as Assistant Manager of Compliance, I am responsible for handling and supervising all cargo claims filed against "K" Line in the United States and Canada. I am also familiar with the process for preparing and issuing bills of lading. Such bills of lading are issued and kept in the regular course of business of "K" Line and KAM. No cargo is shipped without the issuance of a bill of lading. We rely upon such bills of lading for their truth and accuracy in the shipment of the cargo described therein.

4. "K" Line is an ocean carrier organized and existing under the laws of Japan with its headquarters and principal place of business in Tokyo, Japan.

5. KAM, also doing business as The Rail Bridge Corporation, is a Michigan corporation with its principal place of business in Richmond, Virginia. KAM is the general agent of "K" Line in the United

States. As general agent, KAM performs agency services for "K" Line in the United States including dispatching and receiving "K" Line's vessels, arranging for husbanding services and labor as may be required to load, stow and discharge "K" Line's vessels, soliciting and booking of cargo on behalf of "K" Line, issuing shipping documents on behalf of "K" Line, collecting freight, demurrage and other revenue for "K" Line, arranging for inland transportation of "K" Line containers, and handling claims on behalf of "K" Line.

6. I am informed and believe that on or about April 3, 2005, containers KKTU7192886 and KLTU7626760, said by the shipper to container electric motors, were received by "K" Line in Shanghai for carriage to Indianapolis, Indiana, via the Port of Long Beach, in accordance with the terms and conditions of bill of lading KKLUSH7807066.

7. I am informed and believe that seven containers, said by the shipper to contain electric motor parts, were receive by "K" Line in Shanghai for carriage to Milwaukee, via the Port of Long Beach, in accordance with the terms and conditions of bill of lading KKLUSH7807068.

8. I am informed and believe that container KKTU7102774, said by the shipper to contain retainer rail casting, was received the "K" Line in Zhangjiagang for carriage to Chicago via the Ports of Shanghai and Long Beach.

9. I am informed and believe that the ten containers referenced in paragraphs 6, 7 and 8 above were loaded on the CHANG JIANG BRIDGE, Voyage 38E, and were carried from Shanghai to Long Beach where they were discharged.

10. I am informed and believe that the ten containers were delivered to Union Pacific Railroad Company in Long Beach for rail carriage to Indianapolis, Milwaukee and Chicago.

11. I am informed and believe that container KKFU1595257, said by the shipper to contain fireworks, was received by "K" Line in Beihai, People's Republic of China, for carriage to Minneapolis, via the Ports of Hong Kong and Long Beach. I am further informed the container was carried on the vessel CHISWICK BRIDGE, Voyage 14E from Hong Kong to Long Beach. I am further informed the container was delivered to Union Pacific for carriage to Minneapolis.

12. I am informed and believe that on or about April 21, 2005, at or near Tyrone, Oklahoma, the Union Pacific train carrying the above-mentioned containers derailed.

13. On behalf of "K" Line, "K" Line America arranged for the rail carriage of the containers with Union Pacific. The rail carriage of the above mentioned containers by Union Pacific was performed pursuant to the Exempt Rail Transportation Agreement dated as of August 1, 2003. The rail carriage was also subject to the Master Intermodal Transportation Agreement, which is incorporated in reference in the Exempt Rail Transportation Agreement. A true and correct copy of the Exempt Rail Transportation Agreement (with rate information redacted for confidentiality purposes) is attached hereto as Exhibit "A". A true and correct copy of the Master Intermodal Transportation Agreement is attached as Exhibit "B".

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed at Richmond, Virginia, this 12 day of August 2006.

s/ Sherry Johnson
Sherry Johnson

CUSTOMER COUNTERPART

DER-UP-C-21300-A

C.D. No. 54949-1-A

EXEMPT RAIL TRANSPORTATION AGREEMENT

THIS amended AGREEMENT is made and entered into as of August 1, 2003, among UNION PACIFIC RAILROAD COMPANY, a Delaware corporation, having an office at 1416 Dodge Street, Omaha, Nebraska 68179 (hereinafter "UP") and KAWASAKI KISEN KAISHA, LTD. (KKK), a Japanese Corporation, with offices at 2-9 Nishi-Shinbashi 1-Chome, Minato-Ku, Tokyo 105-0003, Japan, by and through its duly authorized agent and representative in the United States, "K" Line AMERICA, INC. (KAM), a Michigan corporation, with offices at 8730 Stony Point Parkway, Suite 400, Richmond, VA 23235, together hereinafter Kawasaki Kisen Kaisha, LTD., and "K" Line America, Inc. shall be collectively referred to as("K" Line).

* * *

Section 2. MINIMUM TRANSPORTATION REQUIREMENT.

A. "K" Line agrees that during each twelve (12) month period of this Agreement commencing August 1, 2003, "K" Line shall tender to UP not less than 95% of its Container traffic, including traffic interchanged with eastern connecting railroads, via the routings specified in Exhibits 1 and 2 of this Agreement.

* * *

Section 5. TRANSPORTATION RATES.

In consideration for UP providing "K" Line with terminal and rail Linehaul transportation services of its loaded or empty Containers and Chassis, "K" Line shall pay UP, in accordance with the terms and conditions of the Billing and Payment Procedures Section of this Agreement, the per Container Contract Rates and other applicable charges set forth in this Agreement and Exhibits 1 and 2 attached to this Agreement as escalated pursuant to Section 6.

* * *

Section 14. SERVICE.

* * *

G. EQUIPMENT.

1. Containers and Chassis

(i) "K" Line shall furnish all Containers and Chassis for movements under this Agreement. UP shall have not responsibility to supply Containers; however, "K" Line reserves the right to use available rail-supplied Chassis as needed at charges as agreed by the parties.

(ii) The responsibility of UP for loss, damage, destruction, maintenance and repair of Containers while Containers are under the control of UP shall be governed by the Uniform Intermodal Interchange Agreement (UIIA).

2. Railcars

(i) UP will provide all necessary railcar equipment upon receiving 5 days

advance forecast from "K" Line.

(ii) "K" Line will furnish to UP information as to the number of 45 foot, 40 foot, and 20 foot Containers 5 days prior to tender of Containers to UP.

(iii) Loaded traffic left behind forty-eight (48) hours from tender to any Union Pacific Facility (including On-Dock) will be trucked to the final Facility location even if this is not a UP site, upon "K" Line's request; e.g., if the Facility-to-Facility rail movement was billed Los Angeles to Atlanta, UP will truck from Los Angeles to Atlanta. "K" Line will reimburse UP for the UP rail rate and will reimburse UP for the other railroad's fee based upon $0.70 per highway mile.

iv) The responsibility of "K" Line and UP for loss, damage, and/or destruction of the DST Railcars shall be governed by the then current Office and Field Manuals of the AAR Interchange Rules.

* * *

JA-123

UNION PACIFIC RAILROAD COMPANY (UPRR)

[Union Pacific Logo]

HISTORY FILE

Master Intermodal Transportation Agreement
(Formerly known as UP Exempt Circular 20-B)

Terms and conditions for the transportation of deregulated Intermodal Shipments

THE TERMS AND PROVISIONS OF THIS MASTER INTERMODAL TRANSPORTATION AGREEMENT ARE SUBJECT TO CHANGE WITHOUT NOTICE

ISSUED: May 1, 2003 EFFECTIVE June 1, 2003

Issued by:
Manager Pricing Simplification
Union Pacific Railroad Company
1416 Dodge Street
Omaha, NE 68179

SECTION 1. GENERAL RULES AND POLICIES

ITEM 1.1: GENERAL RULES

A. Definitions for any capitalized terms used in this Master Intermodal Transportation Agreement (MITA) are set forth in Appendix A hereto. Additional Intermodal Shipment definitions can be found at: **http://www.uprr.com/customers/intermodal/integlos.shtml**

B. The terms and conditions contained in this document apply to all Intermodal Units tendered to UPRR for transportation over its lines.

C. Where any reference is made in individual Intermodal documents, which shall include but is not limited to bills of lading, waybills, transportation agreements, letter quotes or special commodity quotes (SCQ's) to UP Exempt Circular 20-B, or Southern Pacific Lines Intermodal Circular 1000 (SP 1000), then effective with the effective date of this document, it will be understood to mean Union Pacific Railroad Company's (UPRR) Master Intermodal Transportation Agreement (MITA).

D. This MITA and any agreements, price documents or contracts that reference this MITA have been made under 49 U.S.C. § 10709 whereby UPRR or any rail carrier party to any agreement, price document or contract referencing this MITA will provide the Beneficial Owner, Shipper or Customer, with rail transportation and other services outlined herein in exchange for the applicable prices and any charges. This MITA may not be modified

by any notations made on shipping documents. Any changes to this MITA must be approved in writing prior to the issuance of any shipping document.

E. Except as otherwise specifically provided, this MITA sets forth the terms and conditions under which UPRR, or any rail carrier party to an agreement that is subject to this MITA will provide transportation services for a Shipper. The provisions of this MITA shall be incorporated in a contract of carriage (shipping document) provided by Shipper or Shipper's Agent for any transportation, and shall also be incorporated in all certificates, receipts, and other documents described within this MITA.

F. When referring to the term "Master Intermodal Transportation Agreement" or "MITA", it will also incorporate rate circulars and other exempt quotations.

G. The terms and provisions of any agreement or document making reference to this MITA is intended for the sole benefit of the parties to the respective agreement or document. Nothing is intended or may be construed to give any third party any legal or equitable right, remedy or claim under that agreement.

H. If any part, term, item, or provision of this MITA is held by the courts or by any agency having jurisdiction over this Transportation Agreement or the Shipper or carriers, to be unenforceable, illegal, against public policy, or in conflict with any federal, state, or local laws, such part, term, item, or provisions shall be considered severable from the rest of the MITA.

I. This MITA along with the terms and conditions contained in respective agreements, contracts, or documents referencing this MITA as well as the terms and conditions of the UIIA and the UIIA Addendum, ocean or rail carrier's Bills of Lading, and any applicable laws, or regulations shall constitute the entire contract for transportation between the parties.

J. Any notation made upon any shipping document, Bill of Lading or receipt which is in any way inconsistent with the terms of this contract, or which purports to enlarge, modify or change it, shall be considered as a notation made for the private benefit and information of the Shipper, receiver, or their Agents and shall not be a part of any contract arising from this offer. Restrictions on rail transportation made on a shipping document shall be void. In order to obtain special rail handling contact your UPRR Marketing & Sales Business Representative.

K. *Any* variation whatsoever from this MITA can only be accomplished through a document signed by a duly authorized manager of UPRR.

L. Rates, provisions, and UPRR transit times are subject to change without notice.

M. Each Shipment shall be tendered with a proper electronic Bill of Lading or by a proper shipping document. Regardless of billing method, all Shipments are subject to this MITA.

N. Specific provisions in this MITA take precedence over general ones.

O. Shipper agrees to notify any and all other parties involved in this transaction of all the provisions, restrictions, and limitations

contained in this MITA. In the event Shipper fails to perform the obligations of this section, Shipper agrees to defend and indemnify UPRR for any and all costs associated with Claims or lawsuits alleging a lack of knowledge of the terms and conditions of the provisions of this MITA. Shipper specifically agrees to notify the origin loader, Waybill Shippers, Brokers. Freight Forwarders, Beneficial Owners, Receivers, insurers, and draymen of the terms and conditions of this agreement. The presentation of a return receipt signed by an authorized Agent of the addresses with a cover letter indicating the contents of the correspondence shall create a presumption that Shipper has notified the addressee of the terms and conditions of this document for the purposes of this section. Alternatively, a notification to the other parties via e-mail or fax that contains the URL of the UPRR web site and the following language:

"*As a prospective party to this MITA you should be aware that UPRR imposes certain requirements, limitations, and restrictions on cargo transported on its railroad. These provisions cover Blocking and Bracing instructions, Restricted and Prohibited Article cargo, limitations of liability and other important provisions. The complete MITA for UPRR is available at* http://www.up.com/. *Any Customer or party shipping under terms of this MITA should be familiar with the terms and provisions of this MITA prior to becoming involved in any transportation movement.*"

P. Paper copies of this document are available. For a copy, please send Forty-Five Dollars ($45. 00) for shipping and handling to the following address:

*Manager Pricing Simplification
Union Pacific Railroad Company
Union Pacific Center
1400 Douglas Street, Mail Stop 1350
Omaha NE 68179

Q. Intermodal transportation is exempt from regulation by the Surface Transportation Board. UPRR, at its sole discretion, may decline to handle particular traffic movements or movements for particular customers. UPRR does not guarantee the availability of track capacity, terminal capacity, locomotives, train crews or railroad equipment, including rail cars, chassis, containers or trailers. Furthermore, UPRR does not guarantee any particular transit time or availability of shipments for pickup. The foregoing rule is not applicable to the extent that it is superseded or modified by a price document or contract between UPRR and a particular shipper.

ITEM 1.2: LEGAL RIGHTS AND OBLIGATIONS. (This terms and conditions of this Item 1.2 have been intentionally capitalized in order to comply with statutory requirements of various states.)

A. THE SHIPPER OR SHIPPER'S AGENT SHALL BE SOLELY RESPONSIBLE FOR

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* Denotes change or publication clarification.

AND WILL DEFEND, INDEMNIFY AND HOLD HARMLESS UPRR AGAINST ALL CLAIMS FOR PROPERTY LOSS OR DAMAGE, PERSONAL INJURY, DEATH OR ANY OTHER LIABILITY, INCLUDING FINES, RAIL CARRIER COSTS, LATE PAYMENTS, ATTORNEY FEES, INTEREST AND EXPENSES RESULTING FROM ANY SPILL, RESPONSE, MITIGATION, CLEANUP OR DISPOSAL DUE TO THE SHIPPER'S NON-COMPLIANCE WITH ANY LOCAL, STATE OR FEDERAL LAW OR REGULATION: THE TERMS AND CONDITIONS CONTAINED IN THIS MITA AS WELL AS THE APPLICABLE RATE DOCUMENTS.

B. THE SHIPPER OR SHIPPER'S AGENT SHALL ASSUME ALL LEGAL DEFENSE AGAINST ANY THIRD-PARTY CLAIMS FOR DAMAGE DUE TO SHIPPER AND ITS AGENT'S FAILURE TO COMPLY WITH THE OBLIGATIONS CONTAINED IN THIS MITA AND THE APPLICABLE RATE DOCUMENTS.

C. THE SHIPPER OR SHIPPER'S AGENT SHALL BE SOLELY RESPONSIBLE FOR AND WILL DEFEND, INDEMNIFY AND HOLD RAIL CARRIER HARMLESS AGAINST ANY PROPERTY LOSS, DAMAGE, PERSONAL INJURY OR DEATH ARISING DIRECTLY OR INDIRECTLY FROM IMPROPERLY TENDERING RESTRICTED ARTICLES AS SET FORTH IN THIS MITA AND WILL DEFEND,

INDEMNIFY AND HOLD RAIL CARRIER HARMLESS FROM ANY RESPONSIBILITY, INCLUDING ANY RELATED COSTS AND EXPENSES.

D. UNDER NO CIRCUMSTANCES WILL RESTRICTED ARTICLES BE PERMITTED UNDER FAK RATES. ANY RESTRICTED ARTICLES THAT ARE DETERMINED TO BE MOVING UNDER FAK RATES WILL BE CONSIDERED CONTRABAND AND UPRR WILL HAVE NO RESPONSIBILITY FOR LOSS OR DAMAGES TO THOSE ITEMS.

E. THE SHIPPER OR ITS AGENT SHALL BE SOLELY RESPONSIBLE FOR AND WILL DEFEND, INDEMNIFY AND HOLD RAIL CARRIER HARMLESS AGAINST ANY LOSS, DAMAGE, OR PERSONAL INJURY DUE TO ANY DEFECTS IN PRIVATELY OWNED OR LEASED EQUIPMENT.

F. THE SHIPPER OR SHIPPER'S AGENT SHALL BE SOLELY RESPONSIBLE FOR AND WILL DEFEND, INDEMNIFY AND HOLD RAIL CARRIER HARMLESS DUE TO THE PRESENCE OF ANY RESIDUE, OR CONTAMINANTS IN THE "INTERMODAL UNIT".

G. THE SHIPPER OR SHIPPER'S AGENT SHALL BE SOLELY RESPONSIBLE FOR AND WILL DEFEND, INDEMNIFY AND HOLD RAIL CARRIER HARMLESS DUE TO IMPROPERLY IDENTIFIED COMMODITIES.

H. THE SHIPPER OR SHIPPER'S AGENT AGREE TO DEFEND, INDEMNIFY AND HOLD HARMLESS UPRR, OR ANY RAIL CARRIER PARTY TO AN AGREEMENT THAT IS SUBJECT TO THIS MITA FROM ALL CLAIMS AND/OR LAWSUITS FOR LOSS OR DAMAGE, BROUGHT BY ANY PERSON(S) OR ENTITY(IES) ALLEGING PROPERTY LOSS AND/OR PERSONAL INJURY AND/OR DEATH ARISING OUT OF OR RESULTING FROM ANY ACT AND/OR OMISSION OF THE SHIPPER, AND SPECIFICALLY FROM ALL CLAIMS AND LAWSUITS RESULTING FROM THE SHIPPER'S FAILURE TO COMPLY WITH THE TERMS AND PROVISIONS CONTAINED IN THIS MITA, RELATING TO THE RAILROAD'S TRANSPORTATION, STORAGE AND/OR CUSTODY OF THE SUBJECT SHIPMENT, INCLUDING ANY JUDGMENTS, SETTLEMENTS, COSTS, ATTORNEY FEES AND OTHER EXPENSES.

ITEM 1.3: CHOICE OF LAW

The terms and provisions of this MITA will be interpreted based upon Federal Common Law. In no event will this MITA be interpreted under the laws of a foreign country.

* * *

ITEM 3.1: CARGO LOSS AND DAMAGE PROVISIONS

* * *

C. Liability Provisions:

* * *

3. UPRR'S MAXIMUM LIABILITY FOR THE CONTENTS OF ANY INTERMODAL UNIT WILL BE LIMITED TO THE ORIGIN VALUE OF THE COMMODITY, PLUS TRANSPORTATION COSTS OR TWO HUNDRED FIFTY THOUSAND DOLLARS ($250,000.00), WHICHEVER IS THE LESSER OF THE TWO AMOUNTS. FURTHERMORE, UPRR SHALL NOT BE LIABLE FOR ANY LOSS OR DAMAGE TO OR IN CONNECTION WITH THE TRANSPORTATION OF COMMODITY IN AN AMOUNT EXCEEDING $10,000.00 PER PACKAGE OR IN THE CASE OF GOODS NOT SHIPPED IN PACKAGES, PER CUSTOMARY FREIGHT UNIT. ANY LIMITATION ON THE VALUE OF CLAIMS IMPOSED BY ANY OTHER RAIL CARRIERS, MOTOR CARRIER, MARINE CARRIER OR FREIGHT FORWARDER IS INCORPORATED AND MADE A PART OF THIS MITA; THE VALUE OF THE LOWEST MAXIMUM CLAIM AMOUNT SHALL APPLY.

* * *

ITEM 3.2: CARMACK LIABILITY

49 U.S.C. Section 11706 provides for full-value liability and other liability terms for UPRR and the Shipper. In order for a Shipment to be subject to the terms of 49

U.S.C. Section 11706 it must comply with all of the following provisions:

A. Shipper must notify UPRR's Damage Prevention Department in writing to the above address, or via fax at (402) 271-5191, no less than 5 working days in advance of the Shipment being In-Gated at the Intermodal Terminal that the Shipper chooses Carmack liability protection, and

B. On Shipments that Shipper requests full-vaule (Carmack) liability protection Shipper must prepay the Carmack rate. The Carmack rate will be the Freight All Kinds (FAK) rate multiplied by 250%. This Carmack rate will apply unless special written pricing authority is obtained by contacting its UPRR Marketing and Sales Representative or Damage Prevention Services (see Item 3.1 (E 4)). Failure by Shipper to provide a written agreement, prior to the Shipment being In-gated at the Intermodal Terminal or interchanged from a Connecting Carrier, evidencing that UPRR has agreed to provide Carmack Liability for any specified Shipment shall relieve UPRR from any obligation in excess of the liability limits set forth in Item 3.1 CARGO LOSS AND DAMAGE PROVISIONS.

C. Carmack Liability protection is **not** available for Shipments moving under FAK rates.

D. Carmack liability coverage is **not** available for any Shipments that originate outside the borders of the United States of America.

ITEM 3.3: FREIGHT LOSS AND DAMAGE LAWSUITS

A condition precedent to the filing of a lawsuit for freight loss or damage is the filing of a Claim under Item 3.1 of this MITA and meeting the documentation requirements contained in Item 3.1(E).

All lawsuits must be filed within eighteen (18) months from the actual or in the event of loss of Shipment, from the expected date of delivery by UPRR or any Connecting Carrier. All lawsuits for freight loss or damage must be filed in a court of competent jurisdiction in Omaha, Douglas County, Nebraska.

* * *

ITEM 7.7: DEFINITION OF DOMESTIC AND INTERNATIONAL SHIPMENTS

A. Specific to Domestic Shipments:

1. Domestic traffic shall be rated in accordance with prices so identified in individual contracts or pricing documents to which UPRR is a party that incorporate the terms and provisions of this MITA.

2. Domestic traffic is rail traffic that originates and/or terminates in the continental United States.

B. Specific to International Shipments:

1. International traffic is U.S. Intermodal rail traffic involving an immediate prior or subsequent ocean movement.

2. International traffic shall be rated in accordance with prices so identified in individual contracts or pricing documents to which UPRR is a party. Unless otherwise agreed, international rates given to ocean

carriers apply on international traffic moving on their Ocean Bill of Lading and in their specific owned or leased Containers. Any other traffic cannot be moved under these rates.

3. Shipments, which are warehoused, processed, repackaged, etc., prior or subsequent to rail movement will not be considered international traffic and shall be rated as domestic Shipments.
4. Mixed Shipments of domestic traffic and international traffic shall be rated as domestic traffic.
5. Shipments from or to Hawaii, Puerto Rico, Alaska and Guam will be considered international traffic.
6. Customer or its Agent will perform, at Shippers expense, Intermodal Terminal ramping at origin and destinations not located on UPPR.
7. Rates do not include any charge, which may be incurred prior to Interchange on import Shipments or following Interchange on export Shipments.
8. Unless otherwise provided, rates applicable to international border crossings, inclusive of Through Rates to and from Canada and Mexico, do not include: brokerage fees, in-bond preparation; export, import or manifest declaration of messenger services. Shipper is responsible for all ancillary and related charges for the movement of the Shipment.
9. In the event UPRR determines that domestic Shipments are being billed by

Receiver or Shipper under rates applicable only on international Shipments, UPRR shall ASSESS A SURCHARGE of One Thousand dollars ($1,000.00) for each Intermodal Unit so billed. This surcharge will be assessed whether the Intermodal Unit has been shipped or is awaiting shipment by UPRR. This surcharge will be billed to the party submitting rail billing to UPRR. UPRR reserves the right to cancel any rate(s) in contracts or pricing documents on one (1) days notice for improper application by a party.

* * *

Shipper
SHANGHAI ELECTRIC I/E CO., LTD.
13TH FLOOR(S), SOUTH BUILDING 333
CHENGDU ROAD (N), SHANGHAI,
200041
CHINA

B/L No.
KKLUSH7807066
IPI

[logo omitted] **"K" LINE**
KAWASAKI KISEN KAISHA, LTD.

COMBINED TRANSPORT BILL OF LADING

Consignee
MARATHON ELECTRIC
MANUFACTURING CORP.
100 EAST RANDOLPH STREET
P.O. BOX
8003 WAUSAU, WISCONSIN 54402-8003
T: 715-6753311 U.S.A.

Notify party
C.J. INTERNATIONAL, INC
P.O. BOX 42385 INDIANAPOLIS IN
46242-0385.

RECEIVED from the Shipper in apparent good order and condition, unless otherwise indicated herein, Goods or Container(s) or packages(s) said to contain the Goods herein mentioned, to be carried subject to all the terms and conditions provided for on the face and back of this Bill of Lading, from the place of receipt or port of loading to the port of discharge or place of delivery shown herein and there to be delivered. If required by Carrier, this Bill of Lading duly endorsed must

MARATHON ELECTRIC MFG CORP.
P.O. BOX 8003 WAUSAU WI 54402-8003

Pre-Carriage by | Place of receipt
SHANGHAI, , CN CY

Ocean Vessel Voy. No. 38E | Port of loading
CHANG JIANG BRIDGE SHANGHAI,,CN

be surrendered in exchange for Goods or delivery order. None of the terms of this Bill of Lading can be waived by or for Carrier except by express waiver signed by Carrier or its duly authorized agent.

IN ACCEPTING THIS BILL OF LADING, Merchant agrees to be bound by all the stipulations, exceptions, terms and conditions in Carrier's applicable Tariff, whether written, typed, stamped, or printed, as fully as if signed by Merchant, any local custom or privilege to the contrary notwithstanding, and agrees that all representations, agreements or freight engagements for and in connection with Carriage of Goods are superseded by this Bill of Lading. On presentation of one or more original(s) of this Bill of Lading (duly endorsed) to Carrier by or on behalf of Holder, the rights and liabilities arising in accordance

with the terms hereof shall (without prejudice to the terms of this Bill of Lading, or any rule of law or statute rendering them binding on Merchant) become binding in all respects between Carrier and Holder as though the contract evidenced hereby or contained herein had been made between them.

IN WITNESS WHEREOF, the undersigned, on behalf of Kawasaki Kisen Kaisha, Ltd., Vessel, her owners, operators and charterers, has signed the number of Bill(s) of Lading stated below, all of this tenor and date, one of which being accomplished, the others to stand void.

* See Clause 7(2)

Port of discharge	Place of delivery	*Final Destination (for the Merchant's reference)
LONG BEACH, CA, US	INDIANAPOLIS, IN, US DOOR	

Container No.	Seal No. Marks and Numbers	No. of Containers or pkgs.	Kind of packages; description of goods	Gross weight	Measurement
KKTU7192886	CK20898	119 WOODEN	CASES	(17,957.000	26.7900)
KKTU7626760	CK20950	99 WOODEN	CASES	(17,755.000	25.0000)
S05-2013		SHIPPER'S LOAD AND COUNT 2 CONTAINERS			
		218 WOODEN	CASES	35,712.000	51.7900
		ELECTRIC MOTOR CY/DOOR FREIGHT ALL IN D.D.C. PREPAID. (OCEAN FREIGHT DDC. FAF. PORT SURCHARGE STORE DOOR DELIEVRY CHANGE ALL FREIGHT PREPAID			
Particulars furnished by shipper					

SHIP IN 20X20
CONTAINERS
INVOICE.NO.S05-2013

---

2 CONTAINERS (218 WOODEN CASES)

ORIGINAL

Declared Value US$

If shipper enters a value, the ad valorem rate will be charged (See Clause 24)

Total No. of Containers or Packages (in words)	TWO (2) CONTAINERS ONLY			35,712.000	51.7900
Freight and Charges	Revenue Tons	Rate	Per	Prepaid	Collect
"FREIGHT PREPAID"					
[illegible]					

JA-141

[stamp omitted]

Ex. Rate	Prepaid at SHANGHAI	Payable at	Place and date of issue SHANGHAI APR. 3, 2005
	Total prepaid in local currency	No. of original [illegible] THREE (3)	KAWASAKI KISEN KAISHA, LTD. 200504041512 AS CARRIER [stamp omitted]

SHIPPED on board the Vessel		
Date	APR. 3, 2005	
	By --------	By ---------

(Standard form for Container Shipment)

KAWASAKI KISEN KAISHA, LTD. (TOKYO, JAPAN) BILL OF LADING

1. (Definitions & Tariff)

(1) In this Bill of Lading the words and expressions specified below shall have the earnings attributed to them below:

a. "Carriage" means the whole or any part of the operations and services undertaken by Carrier in respect of Goods covered under this Bill of Lading.

b. "Carrier" means KAWASAKI KISEN KAISHA, LTD., Vessel, her owners, operators and charterers whether acting as carrier or bailee.

c. "Combined Transport" means Carriage of Goods by Vessel plus one or more other modes of transport under this Bill of Lading from the place of receipt from Merchant to the place of delivery to Merchant.

d. "Connecting Carrier" means carriers (other than Carrier), contracted by or acting on behalf of Carrier, participating in Carriage of Goods by land, water or air under this Bill of Lading.

* * *

h. "Merchant" includes the shipper, consignor, consignee, owner and receiver of Goods, and Holder, and anyone acting on behalf of any such person, including but not limited to agents, servants, independent contractors and freight forwarders.

i. "Sub-Contractor" includes stevedores, longshoremen, terminal operators,

warehousemen, watchmen, any Connecting Carrier, and any person, firm, corporation, or other legal entity who or which performs services incidental to carriage of Goods under this Bill of Lading, and their servants, agents and independent contractors.

* * *

2. (Governing Law and Jurisdiction) The contract evidenced by or contained in this Bill of Lading shall be governed by Japanese law except as may be otherwise provided for herein, and any action thereunder or in connection with Carriage of Goods shall be brought before the Tokyo District Court in Japan, to whose jurisdiction Merchant irrevocably consents.

* * *

4. (Responsibility For Shipments To, From Or Through US Territories) (1) With respect to Goods shipped to, from or through US Territories, Carrier's responsibilities during the entire period (and not just during Water Carriage) from the time of receipt of Goods to the time of delivery of Goods shall be governed by the United States Carriage of Goods by Sea Act (US COGSA) and US COGSA shall be deemed incorporated herein during the entire aforesaid period, provided however that if loss or damage to Goods is proven to have occurred during other than Water Carriage and outside US Territories, Carrier's responsibilities shall be determined in accordance with Clause 3(B) instead of US COGSA. ... (3) Also, if US COGSA so applies, in no event shall Carrier be or become liable for any loss or damage to or in connection with Carriage of Goods in an amount exceeding US$500 per package lawful money of USA, or in case of

Goods not shipped in packages, per customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such Goods have been declared by the shipper before receipt of Goods by Carrier and inserted in this Bill of Lading.

5. (Sub-Contracting: Exemptions, Immunities, Limitations, etc. of Participant(s)) (1) Carrier shall be entitled to sub-contract on any terms whatsoever Carriage, including without limitation, the loading, unloading, storing, warehousing, handling and any and all duties whatsoever undertaken by Carrier in relation to Goods by any of the following: (I) any Connecting Carrier, (II) masters, officers, crew, employees or any other servants, of Carrier and Connecting Carrier, (III) sub-contractors, stevedores, longshoremen, terminal operators, warehousemen, watchmen, agents and independent contractors whatsoever used or employed by Carrier from time to time in connection with the performance of any of Carrier's obligations under this Bill of Lading (all of the foregoing are hereafter referred to as "Participant(s)"). (2) Merchant undertakes that no claim or allegation shall be made against any of Participants which imposes or attempts to impose upon any of them or any vessel owned or chartered by any of them any liability whatsoever in connection with Goods or Carriage of Goods, whether or not involving the negligence of any such person, and, if any such claim or allegation should nevertheless be made, to indemnify Carrier against all consequences thereof. Without prejudice to the foregoing, every such vessel and Such Participant(s) shall have the benefit of all provisions herein benefiting Carrier as if such provisions were expressly for their benefit; and, in entering into this contract, Carrier, to the extent of

those provisions, does so not only on its own behalf, but also as agent and trustee for such vessel and Participant(s). ...

6. (Methods and Routes of Carriage) It is understood and agreed that (a) Carriage of Goods may be done by more than one method or route of transport (whether or not direct, customary or advertised), including, but not limited to transport by land, water and air and by more than one Vessel or other means of transport; (b) no method or route of transport nor Vessel nor any other means of transport is agreed to be used and the same, at any time, may be changed or substituted without notice from those originally intended by Carrier; (c) Goods or any part thereof may be discharged and/or stored at any port or place, whether named or not;... .

* * *

11. (Container Packed by Merchant) If Goods received by Carrier are in Container(s) into which contents have been packed by or on behalf of Merchant, Merchant warrants that the stowage and securing of the contents of Container(s) and their closing and sealing are safe and proper and also warrants that Container(s) and contents thereof are suitable for Carriage in accordance with the terms hereof including Clause 15. In the event of Merchant's breach of said warranties, Carrier shall not be responsible for any loss of or damage to or in connection with Goods and Merchant shall be liable for loss of or damage to any property, or for personal injury, death or the consequences of any other accidents or events whatsoever and shall defend, indemnify and hold Carrier harmless against all loss, damage, liability, cost or expense, including attorneys' fees, arising out of or in any way connected with said

accidents or events. Merchant shall inspect Container(s) when the same are furnished by or on behalf of Carrier, and they shall be deemed to have been accepted by Merchant as being in sound and suitable condition for the purpose of Carriage contracted herein.

* * *

23. (Notice of Claim and Time for Suit against Carrier) (1) Unless notice of loss or damage and the general nature of such loss or damage be given in writing to Carrier at the port of discharge or place of delivery before or at the time of delivery of Goods or, if the loss or damage be not apparent, within 3 days after delivery, Goods shall be deemed to have been delivered as described in this Bill of Lading. (2) In any event, Carrier shall be discharged from all liability in respect of non-delivery, misdelivery, delay, loss or damage unless suit is brought within one year after delivery of Goods or the date when Goods should have been delivered. (3) Notwithstanding (2) above, with respect of any non-delivery, misdelivery, delay, loss or damage which may have occurred during other than Water Carriage, Merchant must file a claim with Carrier within 9 months after delivery of Goods or the date when Goods should have been delivered, failing which Carrier will be discharged of all liability therefor.

* * *

Shipper
SHANGHAI ELECTRIC I/E CO., LTD.
13TH FLOOR(S), SOUTH BUILDING 333
CHENGDU ROAD (N), SHANGHAI,
200041
CHINA

B/L No.
KKLUSH7807068

[logo omitted] **"K" LINE**
KAWASAKI KISEN KAISHA, LTD.

COMBINED TRANSPORT BILL OF LADING

Consignee
MARATHON ELECTRIC
MANUFACTURING CORP.
100 EAST RANDOLPH STREET
P.O. BOX
8003 WAUSAU, WI 54402-8003

Notify party
MARATHON ELECTRIC
MANUFACTURING CORP.
100 EAST RANDOLPH ST.
P.O. BOX 8003
WAUSAU WI 54402-8003

RECEIVED from the Shipper in apparent good order and condition, unless otherwise indicated herein, Goods or Container(s) or packages(s) said to contain the Goods herein mentioned, to be carried subject to all the terms and conditions provided for on the face and back of this Bill of Lading, from the place of receipt or port of loading to the port of discharge or place of delivery shown herein and there to be delivered. If required by Carrier, this Bill of Lading duly endorsed must

PLS CUSTOM HOUSE BROKERS
ACE INDUSTRIAL PARK 2150AE
COLLGE AVENUE CUDAHY, WI 53110

Pre-Carriage by

Place of receipt
SHANGHAI, , CN CY

Ocean Vessel Voy. No. 38E

Port of loading
CHANG JIANG BRIDGE SHANGHAI,,CN

exchange for Goods or delivery order. None of the terms of this Bill of Lading can be waived by or for Carrier except by express waiver signed by Carrier or its duly authorized agent.

IN ACCEPTING THIS BILL OF LADING, Merchant agrees to be bound by all the stipulations, exceptions, terms and conditions in Carrier's applicable Tariff, whether written, typed, stamped, or printed, as fully as if signed by Merchant, any local custom or privilege to the contrary notwithstanding, and agrees that all representations, agreements or freight engagements for and in connection with Carriage of Goods are superseded by this Bill of Lading. On presentation of one or more original(s) of this Bill of Lading (duly endorsed) to Carrier by or on behalf of Holder, the rights and liabilities arising in accordance with the terms hereof shall (without prejudice

to the terms of this Bill of Lading, or any rule of law or statute rendering them binding on Merchant) become binding in all respects between Carrier and Holder as though the contract evidenced hereby or contained herein had been made between them.

IN WITNESS WHEREOF, the undersigned, on behalf of Kawasaki Kisen Kaisha, Ltd., Vessel, her owners, operators and charterers, has signed the number of Bill(s) of Lading stated below, all of this tenor and date, one of which being accomplished, the others to stand void.

* See Clause 7(2)

Port of discharge	Place of delivery	*Final Destination (for the Merchant's reference)
LONG BEACH, CA, US	MILWAUKEE, WI, US CY	

Container No.	Seal No. Marks and Numbers	No. of Containers or pkgs.	Kind of packages; description of goods	Gross weight	Measurement
CONTAINER AND SEAL AS PER ATTACHED SHEET S05-1013			SHIPPER'S LOAD AND COUNT 7 CONTAINERS 190 WOODEN CASES ELECTRIC MOTOR PARTS SHIP IN 7X20' CONTAINERS APR. 3. 2005 SHIPMENT (OCEAN FREIGHT, D.D.C, FAF, PORT SURCHARGE ALL PREPAID IN SHANGHAI)	121,065.000	167.2900
Particulars Furnished by Shipper					
			7 CONTAINERS (190 WOODEN CASES)		

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ORIGINAL

Declared Value US$ — If shipper enters a value, the ad valorem rate will be charged (See Clause 24)

Total No. of Containers or Packages (in words)	SEVEN (7) CONTAINERS ONLY	121,065.000	167.2900

Freight and Charges	Revenue Tons	Rate	Per	Prepaid	Collect
					0

"FREIGHT PREPAID"

4-25-05
OBL only R
[stamp omitted]

Ex. Rate	Prepaid at	Payable at	Place and date of issue	
	SHANGHAI		SHANGHAI	APR. 3, 2005

	Total prepaid in local currency	No. of original [illegible] THREE (3)	KAWASAKI KISEN KAISHA, LTD. 200504041512 AS CARRIER [stamp omitted]
SHIPPED on board the Vessel Date APR. 3, 2005		By --------	By ---------

(Standard form for Container Shipment)

KAWASAKI KISEN KAISHA, LTD. (TOKYO, JAPAN) BILL OF LADING

1. (Definitions & Tariff)

(1) In this Bill of Lading the words and expressions specified below shall have the earnings attributed to them below:

a. "Carriage" means the whole or any part of the operations and services undertaken by Carrier in respect of Goods covered under this Bill of Lading.

b. "Carrier" means KAWASAKI KISEN KAISHA, LTD., Vessel, her owners, operators and charterers whether acting as carrier or bailee.

c. "Combined Transport" means Carriage of Goods by Vessel plus one or more other modes of transport under this Bill of Lading from the place of receipt from Merchant to the place of delivery to Merchant.

d. "Connecting Carrier" means carriers (other than Carrier), contracted by or acting on behalf of Carrier, participating in Carriage of Goods by land, water or air under this Bill of Lading.

* * *

h. "Merchant" includes the shipper, consignor, consignee, owner and receiver of Goods, and Holder, and anyone acting on behalf of any such person, including but not limited to agents, servants, independent contractors and freight forwarders.

i. "Sub-Contractor" includes stevedores, longshoremen, terminal operators, warehousemen, watchmen, any Connecting Carrier, and any person, firm, corporation, or other legal entity who or which performs services incidental to carriage of Goods under this Bill of Lading, and their servants, agents and independent contractors.

* * *

2. (Governing Law and Jurisdiction) The contract evidenced by or contained in this Bill of Lading shall be governed by Japanese law except as may be otherwise provided for herein, and any action thereunder or in connection with Carriage of Goods shall be brought before the Tokyo District Court in Japan, to whose jurisdiction Merchant irrevocably consents.

* * *

4. (Responsibility For Shipments To, From Or Through US Territories) (1) With respect to Goods shipped to, from or through US Territories, Carrier's responsibilities during the entire period (and not just during Water Carriage) from the time of receipt of Goods to the time of delivery of Goods shall be governed by the United States Carriage of Goods by Sea Act (US COGSA) and US COGSA shall be deemed incorporated herein during the entire aforesaid period, provided however that if loss or damage to Goods is proven to have occurred during other than Water Carriage and outside US Territories, Carrier's responsibilities shall be determined in accordance with Clause 3(B) instead of US COGSA. ... (3) Also, if US COGSA so applies, in no event shall Carrier be or

become liable for any loss or damage to or in connection with Carriage of Goods in an amount exceeding US$500 per package lawful money of USA, or in case of Goods not shipped in packages, per customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such Goods have been declared by the shipper before receipt of Goods by Carrier and inserted in this Bill of Lading.

5. (Sub-Contracting: Exemptions, Immunities, Limitations, etc. of Participant(s)) (1) Carrier shall be entitled to sub-contract on any terms whatsoever Carriage, including without limitation, the loading, unloading, storing, warehousing, handling and any and all duties whatsoever undertaken by Carrier in relation to Goods by any of the following: (I) any Connecting Carrier, (II) masters, officers, crew, employees or any other servants, of Carrier and Connecting Carrier, (III) sub-contractors, stevedores, longshoremen, terminal operators, warehousemen, watchmen, agents and independent contractors whatsoever used or employed by Carrier from time to time in connection with the performance of any of Carrier's obligations under this Bill of Lading (all of the foregoing are hereafter referred to as "Participant(s)"). (2) Merchant undertakes that no claim or allegation shall be made against any of Participants which imposes or attempts to impose upon any of them or any vessel owned or chartered by any of them any liability whatsoever in connection with Goods or Carriage of Goods, whether or not involving the negligence of any such person, and, if any such claim or allegation should nevertheless be made, to indemnify Carrier against all consequences thereof. Without prejudice to the foregoing, every such vessel and Such Participant(s) shall have the benefit of

all provisions herein benefiting Carrier as if such provisions were expressly for their benefit; and, in entering into this contract, Carrier, to the extent of those provisions, does so not only on its own behalf, but also as agent and trustee for such vessel and Participant(s). ...

6. (Methods and Routes of Carriage) It is understood and agreed that (a) Carriage of Goods may be done by more than one method or route of transport (whether or not direct, customary or advertised), including, but not limited to transport by land, water and air and by more than one Vessel or other means of transport; (b) no method or route of transport nor Vessel nor any other means of transport is agreed to be used and the same, at any time, may be changed or substituted without notice from those originally intended by Carrier; (c) Goods or any part thereof may be discharged and/or stored at any port or place, whether named or not;... .

* * *

11. (Container Packed by Merchant) If Goods received by Carrier are in Container(s) into which contents have been packed by or on behalf of Merchant, Merchant warrants that the stowage and securing of the contents of Container(s) and their closing and sealing are safe and proper and also warrants that Container(s) and contents thereof are suitable for Carriage in accordance with the terms hereof including Clause 15. In the event of Merchant's breach of said warranties, Carrier shall not be responsible for any loss of or damage to or in connection with Goods and Merchant shall be liable for loss of or damage to any property, or for personal injury, death or the consequences of any

other accidents or events whatsoever and shall defend, indemnify and hold Carrier harmless against all loss, damage, liability, cost or expense, including attorneys' fees, arising out of or in any way connected with said accidents or events. Merchant shall inspect Container(s) when the same are furnished by or on behalf of Carrier, and they shall be deemed to have been accepted by Merchant as being in sound and suitable condition for the purpose of Carriage contracted herein.

* * *

23. (Notice of Claim and Time for Suit against Carrier) (1) Unless notice of loss or damage and the general nature of such loss or damage be given in writing to Carrier at the port of discharge or place of delivery before or at the time of delivery of Goods or, if the loss or damage be not apparent, within 3 days after delivery, Goods shall be deemed to have been delivered as described in this Bill of Lading. (2) In any event, Carrier shall be discharged from all liability in respect of non-delivery, misdelivery, delay, loss or damage unless suit is brought within one year after delivery of Goods or the date when Goods should have been delivered. (3) Notwithstanding (2) above, with respect of any non-delivery, misdelivery, delay, loss or damage which may have occurred during other than Water Carriage, Merchant must file a claim with Carrier within 9 months after delivery of Goods or the date when Goods should have been delivered, failing which Carrier will be discharged of all liability therefor.

* * *

ATTACHED SHEET

SHEET NO. 1
KKLUSH7807068

CHANG JIANG BRIDGE 38E LONG BEACH, CA, US MILWAUKEE, WI, US

CONTAINER AND SEAL			KGS	CBM
KKTU7180442	28973	36 WOODEN CASES	(17,701.000	25.8000)
KKTU1304431	28977	30 WOODEN CASES	(16,890.000	25.3800)
KKTU7587633	28971	30 WOODEN CASES	(16,890.000	25.3800)
KKTU7561069	28976	24 WOODEN CASES	(17,750.000	22.5000)
KKTU7562358	28975	24 WOODEN CASES	(16,270.000	22.0500)
KKTU7505229	28972	21 WOODEN CASES	(17,770.000	23.5900)
KKTU7425740	28974	25 WOODEN CASES	(17,794.000	22.5900)

Shipper
BEIHAI QIANGHENG I/E TRADING CO., LTD.
QIANGSHENG BUILDING, BEIHAI ROAD,
BEIHAI, GUANGXI 536000, CHINA

14272

B/L No.
KKLU826146965
B/L
IPI

Consignee VICTORY FIREWORKS, L.L.C.
579 VINCENT LANE
ELLSWORTH WIS. 54011 USA
TEL: 715-273-3590
FAX: 715-273-3593

Notify party NOTIFY PARTY
AS PER ATTACHED SHEET

[logo omitted] **"K" LINE**
KAWASAKI KISEN KAISHA, LTD.

COMBINED TRANSPORT BILL OF LADING

RECEIVED from the Shipper in apparent good order and condition, unless otherwise indicated herein, Goods or Container(s) or packages(s) said to contain the Goods herein mentioned to be carried subject to all the terms and conditions provided for on the face and back of this Bill of Lading from the place of receipt or port of loading to the port of discharge or place of delivery shown herein and there to be delivered. If required by

Pre-Carriage by	Place of receipt
LIGHTER	BEIHAI CY
Ocean Vessel Voy. No. 14E	Port of loading
CHISWICK BRIDGE	HONG KONG

Carrier, this Bill of Lading duly endorsed must be surrendered in exchange for Goods or delivery order. None of the terms of this Bill of Lading can be waived by or for Carrier except by express waiver signed by Carrier or its duly authorized agent.

IN ACCEPTING THIS BILL OF LADING, Merchant agrees to be bound by all the stipulations, exceptions, terms and conditions in Carrier's applicable Tariff, whether written, typed, stamped, or printed, as fully as if signed by Merchant, any local custom or privilege to the contrary notwithstanding, and agrees that all representations, agreements or freight engagements for and in connection with Carriage of Goods are superseded by this Bill of Lading. On Presentation of one or more original(s) of this Bill of Lading (duly endorsed) to Carrier by or on behalf of Holder,

the rights and liabilities arising in accordance with the terms hereof shall (without prejudice to the terms of this Bill of Lading, or any rule of law or statute rendering them binding on Merchant) become binding in all respects between Carrier and Holder as though the contract evidenced hereby or contained herein had been made between them.

IN WITNESS WHEREOF, the undersigned, on behalf of Kawasaki Kisen Kaisha, Ltd., Vessel, her owners, operators and charterers, has signed the number of Bill(s) of Lading stated below, all of this tenor and date, one of which being accomplished, the others to stand void.

* See Clause 7(2)

Port of discharge	Place of delivery	*Final Destination (for the Merchant's reference)
LONG BEACH, CA, US	MINNEAPOLIS MN CY	

Container No.	Seal No. Marks and Numbers	No. of Containers or pkgs.	Kind of packages; description of goods	Gross weight	Measurement
KKFU1595257	40DRY BR14931		LADEN ON BOARD: 2005/ 03/30	KGS	M3
N/M					[stamp omitted]

"SHIPPER'S LOAD AND COUNT"

1 CONTAINER(S)
PACKAGES DETAILS
AS PER ATTACHED SHEET

---

1 CONTAINER(S) (998 CTNS)

"THIS IS TO CERTIFY THAT THE ABOVE NAMED ARTICLES ARE IN PROPERLY CLASSIFIED, DESCRIBED, PACKAGED, MARKED

Particulars Furnished by Shipper

AND LABELED, AND ARE IN PROPER CONDITION FOR TRANSPORTATION ACCORDING TO THE APPLICABLE REGULATIONS OF THE US DEPARTMENT OF TRANSPORTATION."

"SHIPPER ADVISES SHIPMENT CONTAINS NO SWPM"

Declared Value US$ — If shipper enters a value, the ad valorem rate will be charged (See Clause 24)

Total No. of Containers or Packages (in words): ONE (1) CONTAINERS ONLY — 14,896.500 — 59.026

Freight and Charges	Revenue Tons	Rate	Per	Prepaid	Collect
					0

"FREIGHT PREPAID AS ARRANGED"

Ex. Rate	Prepaid at	Payable at	Place and date of issue
2005/03/17	HONG KONG		HONG KONG 2005/03/30
	Total prepaid in local currency	No. of original [illegible] THREE (3)	KAWASAKI KISEN KAISHA, LTD. AS CARRIER [stamp omitted]
SHIPPED on board the Vessel Date		By _____	By s/illegible _____ by "K" LINE (HONG KONG) LTD.

(Standard form for Container Shipment)

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KAWASAKI KISEN KAISHA, LTD. (TOKYO, JAPAN) BILL OF LADING

1. (Definitions & Tariff)

(1) In this Bill of Lading the words and expressions specified below shall have the earnings attributed to them below:

a. "Carriage" means the whole or any part of the operations and services undertaken by Carrier in respect of Goods covered under this Bill of Lading.

b. "Carrier" means KAWASAKI KISEN KAISHA, LTD., Vessel, her owners, operators and charterers whether acting as carrier or bailee.

c. "Combined Transport" means Carriage of Goods by Vessel plus one or more other modes of transport under this Bill of Lading from the place of receipt from Merchant to the place of delivery to Merchant.

d. "Connecting Carrier" means carriers (other than Carrier), contracted by or acting on behalf of Carrier, participating in Carriage of Goods by land, water or air under this Bill of Lading.

* * *

h. "Merchant" includes the shipper, consignor, consignee, owner and receiver of Goods, and Holder, and anyone acting on behalf of any such person, including but not limited to agents, servants, independent contractors and freight forwarders.

i. "Sub-Contractor" includes stevedores, longshoremen, terminal operators,

warehousemen, watchmen, any Connecting Carrier, and any person, firm, corporation, or other legal entity who or which performs services incidental to carriage of Goods under this Bill of Lading, and their servants, agents and independent contractors.

* * *

2. (Governing Law and Jurisdiction) The contract evidenced by or contained in this Bill of Lading shall be governed by Japanese law except as may be otherwise provided for herein, and any action thereunder or in connection with Carriage of Goods shall be brought before the Tokyo District Court in Japan, to whose jurisdiction Merchant irrevocably consents.

* * *

4. (Responsibility For Shipments To, From Or Through US Territories) (1) With respect to Goods shipped to, from or through US Territories, Carrier's responsibilities during the entire period (and not just during Water Carriage) from the time of receipt of Goods to the time of delivery of Goods shall be governed by the United States Carriage of Goods by Sea Act (US COGSA) and US COGSA shall be deemed incorporated herein during the entire aforesaid period, provided however that if loss or damage to Goods is proven to have occurred during other than Water Carriage and outside US Territories, Carrier's responsibilities shall be determined in accordance with Clause 3(B) instead of US COGSA. ... (3) Also, if US COGSA so applies, in no event shall Carrier be or become liable for any loss or damage to or in connection with Carriage of Goods in an amount exceeding US$500 per package lawful money of USA, or in case of

Goods not shipped in packages, per customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such Goods have been declared by the shipper before receipt of Goods by Carrier and inserted in this Bill of Lading.

5. (Sub-Contracting: Exemptions, Immunities, Limitations, etc. of Participant(s)) (1) Carrier shall be entitled to sub-contract on any terms whatsoever Carriage, including without limitation, the loading, unloading, storing, warehousing, handling and any and all duties whatsoever undertaken by Carrier in relation to Goods by any of the following: (I) any Connecting Carrier, (II) masters, officers, crew, employees or any other servants, of Carrier and Connecting Carrier, (III) sub-contractors, stevedores, longshoremen, terminal operators, warehousemen, watchmen, agents and independent contractors whatsoever used or employed by Carrier from time to time in connection with the performance of any of Carrier's obligations under this Bill of Lading (all of the foregoing are hereafter referred to as "Participant(s)"). (2) Merchant undertakes that no claim or allegation shall be made against any of Participants which imposes or attempts to impose upon any of them or any vessel owned or chartered by any of them any liability whatsoever in connection with Goods or Carriage of Goods, whether or not involving the negligence of any such person and, if any such claim or allegation should nevertheless be made, to indemnify Carrier against all consequences thereof. Without prejudice to the foregoing, every such vessel and Such Participant(s) shall have the benefit of all provisions herein benefiting Carrier as if such provisions were expressly for their benefit; and, in entering into this contract, Carrier, to the extent of

those provisions, does so not only on its own behalf, but also as agent and trustee for such vessel and Participant(s). ...

6. (Methods and Routes of Carriage) It is understood and agreed that (a) Carriage of Goods may be done by more than one method or route of transport (whether or not direct, customary or advertised), including, but not limited to transport by land, water and air and by more than one Vessel or other means of transport; (b) no method or route of transport nor Vessel nor any other means of transport is agreed to be used and the same, at any time, may be changed or substituted without notice from those originally intended by Carrier; (c) Goods or any part thereof may be discharged and/or stored at any port or place, whether named or not;... .

* * *

11. (Container Packed by Merchant) If Goods received by Carrier are in Container(s) into which contents have been packed by or on behalf of Merchant, Merchant warrants that the stowage and securing of the contents of Container(s) and their closing and sealing are safe and proper and also warrants that Container(s) and contents thereof are suitable for Carriage in accordance with the terms hereof including Clause 15. In the event of Merchant's breach of said warranties, Carrier shall not be responsible for any loss of or damage to or in connection with Goods and Merchant shall be liable for loss of or damage to any property, or for personal injury, death or the consequences of any other accidents or events whatsoever and shall defend, indemnify and hold Carrier harmless against all loss, damage, liability, cost or expense, including attorneys' fees, arising out of or in any way connected with said

accidents or events. Merchant shall inspect Container(s) when the same are furnished by or on behalf of Carrier, and they shall be deemed to have been accepted by Merchant as being in sound and suitable condition for the purpose of Carriage contracted herein.

* * *

23. (Notice of Claim and Time for Suit against Carrier) (1) Unless notice of loss or damage and the general nature of such loss or damage be given in writing to Carrier at the port of discharge or place of delivery before or at the time of delivery of Goods or, if the loss or damage be not apparent, within 3 days after delivery, Goods shall be deemed to have been delivered as described in this Bill of Lading. (2) In any event, Carrier shall be discharged from all liability in respect of non-delivery, misdelivery, delay, loss or damage unless suit is brought within one year after delivery of Goods or the date when Goods should have been delivered. (3) Notwithstanding (2) above, with respect of any non-delivery, misdelivery, delay, loss or damage which may have occurred during other than Water Carriage, Merchant must file a claim with Carrier within 9 months after delivery of Goods or the date when Goods should have been delivered, failing which Carrier will be discharged of all liability therefor.

* * *

VESSEL/VOY : CHISWICK	KKLU826146965
BRIDGE / 14E	

DESCRIPTION DETAILS

(998 CTNS) 14,896.500 59.026

FIREWORKS, 1.46, UNNO 0336, PAGE 1260

NET WEIGHT:13608KGS

EMERGENCY PHONE:

800-255-3924 (24 HOURS)

OR WAYNE SCHULTE: 715-273-3590

- -

1 CONTAINER(S) (998 CTNS)

VESSEL/VOY : CHISWICK	KKLU826146965
BRIDGE / 14E	

NOTIFY PARTY

1) VICTORY FIREWORKS, L.L.C.

579 VINCENT LANE

ELLSWORTH WIS. 54011 USA

TEL: 715-273-3590

FAX: 715-273-3593

2) SUPERIOR BROKERAGE SERVICES, INC.

2600 E. 81ST ST.

BLOOMINGTON, MN 55425 USA

TEL: (952) 854-5053

FAX: (952) 854-5153

Shipper
JIANGSU GUOTAI INTL GROUP
ELECTRONICS
IMP/EXP CO., LTD.8TH FLR,GUOTAI
BLDG
RENMIN RD ZHANGJIAGANG CITY
CHINA 215600
TEL:051258683000

B/L No.
KKLUZG6400686
GDZY055302010

[logo omitted] **"K" LINE**
KAWASAKI KISEN KAISHA, LTD.

COMBINED TRANSPORT BILL OF LADING

Consignee
UNITED STEEL&FASTENERS INC
1500 INDUSTRIAL DRIVE. ITASCA.IL
60143
TEL:16302500900

Notify party
WORLD COMMERCE.830 DILLON RD.
WOOSSAIL.
IL 60191 AND UNITED STEEL &

RECEIVED from the Shipper in apparent good order and condition, unless otherwise indicated herein, Goods or Container(s) or packages(s) said to contain the Goods herein mentioned to be carried subject to all the terms and conditions provided for on the face and back of this Bill of Lading from the place of receipt or port of loading to the port of discharge or place of delivery shown herein

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FASTENERS INC.

Pre-Carriage by		Place of receipt ZHANGJIAGANG
Ocean Vessel SU XU JI 1	Voy. No. V.018E	Port of loading ZHANGJIAGANG

and there to be delivered. If required by Carrier, this Bill of Lading duly endorsed must be surrendered in exchange for Goods or delivery order. None of the terms of this Bill of Lading can be waived by or for Carrier except by express waiver signed by Carrier or its duly authorized agent.

IN ACCEPTING THIS BILL OF LADING, Merchant agrees to be bound by all the stipulations, exceptions, terms and conditions in Carrier's applicable Tariff, whether written, typed, stamped, or printed, as fully as if signed by Merchant, any local custom or privilege to the contrary notwithstanding, and agrees that all representations, agreements or freight engagements for and in connection with Carriage of Goods are superseded by this Bill of Lading. On presentation of one or more original(s) of this Bill of Lading (duly

endorsed) to Carrier by or on behalf of Holder, the rights and liabilities arising in accordance with the terms hereof shall (without prejudice to the terms of this Bill of Lading, or any rule of law or statute rendering them binding on Merchant) become binding in all respects between Carrier and Holder as though the contract evidenced hereby or contained herein had been made between them.

IN WITNESS WHEREOF, the undersigned, on behalf of Kawasaki Kisen Kaisha, Ltd., Vessel, her owners, operators and charterers, has signed the number of Bill(s) of Lading stated below, all of this tenor and date, one of which being accomplished, the others to stand void.

* See Clause 7(2)

Port of discharge LONG BEACH		Place of delivery CHICAGO	*Final Destination (for the Merchant's reference)		
Container No.	Seal No. Marks and Numbers	No. of Containers or pkgs.	Kind of packages; description of goods	Gross weight	Measurement
			SHIPPER'S LOAD&COUNT&SEAL		
USF INC PO#46945/ 47173/45887- 01/434/433 CHICAGO C/NO:1-26 MADE IN CHINA KKTU7102774/ZC1554/ 20		26 PACKAGES (48190PCS)	1X20GP CY-CY RETAINER NAIL CASTING THIS SHIPMENT CONTAINS NO SOLID WOOD PACKING MATERIALS ORIGINAL	KGS 17000	M3 15

Particulars
Furnished by

Shipper
Declared Value US$ If shipper enters a value, the ad valorem rate will be charged (See Clause 24)

Total No. of Containers or Packages (in words) SAY TWENTY SIX PACKAGES ONLY

Freight and Charges	Revenue Tons	Rate	Per	Prepaid	Collect
				---	---

"FREIGHT PREPAID"
BAF PERPAID DDC COLLECT

JIANGSU UNIWILL LOGISTICS CO., LTD. [Chinese translation omitted]
s/ illegible,

JIANGSU UNIWILL LOGISTICS CO., LTD.
[Chinese translation omitted]

Ex. Rate	Prepaid at	Payable at	Place and date of issue
			ZHANGJIANG APR-01-05

	Total prepaid in local currency s/illegible	No. of original [illegible] THREE	KAWASAKI KISEN KAISHA, LTD. Manager as agents signed for the carrier AS CARRIER [stamp omitted]

SHIPPED on board the Vessel			
Date APR-01-05	Manager as agent signed for the carrier	SU XU JI 1 V018E By ---------	By ---------

(Standard form for Container Shipment)

JA-178

KAWASAKI KISEN KAISHA, LTD. (TOKYO, JAPAN) BILL OF LADING

1. (Definitions & Tariff)

(1) In this Bill of Lading the words and expressions specified below shall have the earnings attributed to them below:

a. "Carriage" means the whole or any part of the operations and services undertaken by Carrier in respect of Goods covered under this Bill of Lading.

b. "Carrier" means KAWASAKI KISEN KAISHA, LTD., Vessel, her owners, operators and charterers whether acting as carrier or bailee.

c. "Combined Transport" means Carriage of Goods by Vessel plus one or more other modes of transport under this Bill of Lading from the place of receipt from Merchant to the place of delivery to Merchant.

d. "Connecting Carrier" means carriers (other than Carrier), contracted by or acting on behalf of Carrier, participating in Carriage of Goods by land, water or air under this Bill of Lading.

* * *

h. "Merchant" includes the shipper, consignor, consignee, owner and receiver of Goods, and Holder, and anyone acting on behalf of any such person, including but not limited to agents, servants, independent contractors and freight forwarders.

i. "Sub-Contractor" includes stevedores, longshoremen, terminal operators,

warehousemen, watchmen, any Connecting Carrier, and any person, firm, corporation, or other legal entity who or which performs services incidental to carriage of Goods under this Bill of Lading, and their servants, agents and independent contractors.

* * *

2. (Governing Law and Jurisdiction) The contract evidenced by or contained in this Bill of Lading shall be governed by Japanese law except as may be otherwise provided for herein, and any action thereunder or in connection with Carriage of Goods shall be brought before the Tokyo District Court in Japan, to whose jurisdiction Merchant irrevocably consents.

* * *

4. (Responsibility For Shipments To, From Or Through US Territories) (1) With respect to Goods shipped to, from or through US Territories, Carrier's responsibilities during the entire period (and not just during Water Carriage) from the time of receipt of Goods to the time of delivery of Goods shall be governed by the United States Carriage of Goods by Sea Act (US COGSA) and US COGSA shall be deemed incorporated herein during the entire aforesaid period, provided however that if loss or damage to Goods is proven to have occurred during other than Water Carriage and outside US Territories, Carrier's responsibilities shall be determined in accordance with Clause 3(B) instead of US COGSA. ... (3) Also, if US COGSA so applies, in no event shall Carrier be or become liable for any loss or damage to or in connection with Carriage of Goods in an amount exceeding

US$500 per package lawful money of USA, or in case of Goods not shipped in packages, per customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such Goods have been declared by the shipper before receipt of Goods by Carrier and inserted in this Bill of Lading.

5. (Sub-Contracting: Exemptions, Immunities, Limitations, etc. of Participant(s)) (1) Carrier shall be entitled to sub-contract on any terms whatsoever Carriage, including without limitation, the loading, unloading, storing, warehousing, handling and any and all duties whatsoever undertaken by Carrier in relation to Goods by any of the following: (I) any Connecting Carrier, (II) masters, officers, crew, employees or any other servants, of Carrier and Connecting Carrier, (III) sub-contractors, stevedores, longshoremen, terminal operators, warehousemen, watchmen, agents and independent contractors whatsoever used or employed by Carrier from time to time in connection with the performance of any of Carrier's obligations under this Bill of Lading (all of the foregoing are hereafter referred to as "Participant(s)"). (2) Merchant undertakes that no claim or allegation shall be made against any of Participants which imposes or attempts to impose upon any of them or any vessel owned or chartered by any of them any liability whatsoever in connection with Goods or Carriage of Goods, whether or not involving the negligence of any such person, and, if any such claim or allegation should nevertheless be made, to indemnify Carrier against all consequences thereof. Without prejudice to the foregoing, every such vessel and Such Participant(s) shall have the benefit of all provisions herein benefiting Carrier as if such provisions were expressly for their benefit; and, in

entering into this contract, Carrier, to the extent of those provisions, does so not only on its own behalf, but also as agent and trustee for such vessel and Participant(s). ...

6. (Methods and Routes of Carriage) It is understood and agreed that (a) Carriage of Goods may be done by more than one method or route of transport (whether or not direct, customary or advertised), including, but not limited to transport by land, water and air and by more than one Vessel or other means of transport; (b) no method or route of transport nor Vessel nor any other means of transport is agreed to be used and the same, at any time, may be changed or substituted without notice from those originally intended by Carrier; (c) Goods or any part thereof may be discharged and/or stored at any port or place, whether named or not;... .

* * *

11. (Container Packed by Merchant) If Goods received by Carrier are in Container(s) into which contents have been packed by or on behalf of Merchant, Merchant warrants that the stowage and securing of the contents of Container(s) and their closing and sealing are safe and proper and also warrants that Container(s) and contents thereof are suitable for Carriage in accordance with the terms hereof including Clause 15. In the event of Merchant's breach of said warranties, Carrier shall not be responsible for any loss of or damage to or in connection with Goods and Merchant shall be liable for loss of or damage to any property, or for personal injury, death or the consequences of any other accidents or events whatsoever and shall defend, indemnify and hold Carrier harmless against all loss,

damage, liability, cost or expense, including attorneys' fees, arising out of or in any way connected with said accidents or events. Merchant shall inspect Container(s) when the same are furnished by or on behalf of Carrier, and they shall be deemed to have been accepted by Merchant as being in sound and suitable condition for the purpose of Carriage contracted herein.

* * *

23. (Notice of Claim and Time for Suit against Carrier) (1) Unless notice of loss or damage and the general nature of such loss or damage be given in writing to Carrier at the port of discharge or place of delivery before or at the time of delivery of Goods or, if the loss or damage be not apparent, within 3 days after delivery, Goods shall be deemed to have been delivered as described in this Bill of Lading. (2) In any event, Carrier shall be discharged from all liability in respect of non-delivery, misdelivery, delay, loss or damage unless suit is brought within one year after delivery of Goods or the date when Goods should have been delivered. (3) Notwithstanding (2) above, with respect of any non-delivery, misdelivery, delay, loss or damage which may have occurred during other than Water Carriage, Merchant must file a claim with Carrier within 9 months after delivery of Goods or the date when Goods should have been delivered, failing which Carrier will be discharged of all liability therefor.

* * *

"K" LINE SERVICE CONTRACT - SCNO. 13933

ESSENTIAL TERMS ("ET") PUBLICATION:
KKLU-150
ESSENTIAL TERMS NO.:
TARIFFS OF GENERAL APPLICABILITY:

This Service Contract ("Contract") is made and concluded this day of Mar, 31, 2004, by and between Kawasaki Kaisha, Ltd. ("K" Line), an ocean common carrier ("Carrier"), and Shanghai Electric Import and Export Corp., an (hereafter "Shipper"), whereby the parties mutually agree as set forth in Appendix A – attached hereto. IN WITNESS WHEREOF,
the parties have executed this Contract through their responsible representatives duly authorized as of the dates hereinafter written, SUBJECT TO ARBITRATION CLAUSE IN CLAUSE XII.

s/illegible	s/Wu Hong Bing
(Signature) Date	(Signature) Date: 2004/3/31
	Wu Hong Bing
	Vice General Manager

"K" Line America Inc.	Address: 13th Floor(S),
as agents for Kawasaki	South Building,
Kisen Kaisha	33 Chengdu Road (N),
	Shanghai
301 Concourse Blvd.	Tel: 0086-21-52980505
Suite 300	Fax: 0086-21-52980461
Glen Allen, VA 23060	
Tel. (804) 935 3100	
Fax (804) 935 3119	

Affiliates of Shipper
Covered by this Contract:
Refer to Appendix A

Shipper Certification
Pursuant to FMC regulation 46 C.F.R. 530.6 Shipper, by execution of this Contract, certifies its status and that of all its affiliates authorized to utilize this Contract as:
(1) X cargo owner or consignee; (2) _____ other (specify: _____); or (3) _____ signatory acting as Ocean Transport Intermediary(ies). If status is #3 above, Shipper further certifies that any such OTIs have tariff(s) and bond(s) on file with the FMC in full compliance with FMC regulations and that copies of tariff pages reflecting same have been provided to Carrier.

"K" LINE SERVICE CONTRACT - SCNO. 13933

ESSENTIAL TERMS ("ET") PUBLICATION:
KKLU-150
ESSENTIAL TERMS NO.: 13933
TARIFFS OF GENERAL APPLICABILITY :
KKLU – 129, 143

This Service Contract ("Contract") is made and concluded this day of Mar 31 2004, by and between Kawasaki Kaisha, Ltd. ("K" Line), an ocean common carrier ("Carrier"), and Shanghai Electric Import and Export Corp. an (hereafter "Shipper"), whereby the parties mutually agree as set forth in Appendix A – attached hereto. IN WITNESS WHEREOF, the parties have executed this Contract through their responsible representatives duly authorized as of the dates hereinafter written, SUBJECT TO ARBITRATION CLAUSE IN CLAUSE XII.

(Signature) Date	(Signature) Date: 2004/3/31
TY Cheng	Wu Hong Bing
VP Import	Vice General Manager
"K" Line America Inc. as agents for Kawasaki Kisen Kaisha	Address: 13th Floor(S), South Building, 33 Chengdu Road (N), Shanghai
301 Concourse Blvd.	Tel: 0086-21-52980505
Suite 300	Fax: 0086-21-52980461
Glen Allen, VA 23060	

Tel. (804) 935 3100
Fax (804) 935 3119

Affiliates of Shipper
Covered by this Contract:
Refer to Appendix A

Shipper Certification
Pursuant to FMC regulation 46 C.F.R. 530.6 Shipper, by execution of this Contract, certifies its status and that of all its affiliates authorized to utilize this Contract as:
(1) X cargo owner or consignee; (2) _____ other (specify: _____); or (3) _____ signatory acting as Ocean Transport Intermediary(ies). If status is #3 above, Shipper further certifies that any such OTIs have tariff(s) and bond(s) on file with the FMC in full compliance with FMC regulations and that copies of tariff pages reflecting same have been provided to Carrier.

Final Boilerplate

SERVICE CONTRACT NO. 13933

The parties, Kawasaki Kisen Kaisha, Ltd. ("K" Line), Hibiya Central Building, 2 - 9, Nishi-Shinbashi 1-Chome, Minato-Ku, Tokyo 105, Japan, a Japanese corporation ("Carrier"), and Shanghai Electric Import and Export Corp., a Chinese corporation ("Shipper") hereby agree to the following terms and conditions governing carriage of Shipper's cargoes on Carrier' s Vessels.

I. PARTIES. The Shipper is deemed to include the corporation signing this Contract and all its affiliates listed (by name and business address) in Appendix A hereto, together with verification of shipper status. Carrier is Kawasaki Kisen Kaisha, Ltd., and its Vessels shall be deemed to include any vessel on which it has chartered space or slots.

II. GOVERNING TARIFFS: All cargoes moving hereunder, unless otherwise provided herein shall be subject to the common group rates, charges, or rules as applicable at time of shipment contained in the governing "K" Line Tariff(s) listed on the signature page of the contract.

III. TERM. The term of this Contract shall be from its Effective Date under Federal Maritime Regulations or on the first day of the Term as shown in Appendix A hereto (whichever is later) and shall end as per Appendix A.

IV. PARTIES OBLIGATIONS.

A. Shipper agrees to ship a minimum quantity of containers containing commodities as shown in Appendix A hereto (the "MQC") during the Term of this Contract from the Origins and to the Destinations port ranges, ports or points (for through intermodal services, Origin and Destination geographic areas) listed in Appendix A at the rates specified in Appendix A and, except as otherwise specified herein, subject to the rules and charges provided in Carrier's governing Tariff covering the Origins and Destinations, as in effect at time of receipt by Carrier. A 40-ft or 45' ft. container shall count as two TEUs.

B. Carrier agrees to carry, from the Origins to the Destinations, the MQC of cargoes which Shipper is the beneficial owner, consignee, the person paying for the ocean transportation, or is an NVOCC or member of a Shipper's Association where applicable, at the rated in Appendix A, subject to applicable rules and charges as noted above. Any additional quantity of such cargoes carried by Carrier during the Term of this contract shall be carried under the terms of this Contract.

V. SERVICE COMMITMENT. Carrier agrees to carry the MQC of Shipper's containers on its scheduled Vessels during the Term, upon seven-(7) day's notice prior to scheduled sailing, from the Origins to the Destinations.

VI. VERIFICATION. Each original Bill of Lading governing individual shipments under this Contract and all copies thereof shall bear a notation showing the service contract number of this Contract. The designation by Shipper of cargo as Contract cargo by affixing the Contract number on the bill of lading shall be made at the time of the issuance of the bill of lading and shall be final, absent inadvertent error. Shipper agrees to submit promptly to the Carrier, on a monthly basis, statements of the quantity of cargo shipped under this Contract, the statements to be in writing supported by a copy of the Bills of Lading.

VII. FORCE MAJEURE. In the event force majeure circumstances, including work stoppages, strikes, accidents, casualties, lockouts, fire, road, marine or rail disasters, acts of God, governmental restraints, war or hostilities, embargoes or other similar conditions, but not commercial contingencies (e.g., hanging markets, poor management decisions, business declines, bankruptcy of a customer or of a supplier, etc.), the Shipper or Carrier shall notify the other party in writing within seven (7) working days of the existence of such circumstances and of the effect on its ability to perform its obligations hereunder and shall immediately notify the other party of the cessation of the force majeure conditions. Upon receipt of such notice of force majeure conditions, the parties shall be excused from their obligations under this Contract to the extent of and for the duration of the disability.

VIII. BILL OF LADING PROVISIONS. All terms and conditions (front and back) of Carrier's applicable Bill of Lading form, as effective upon cargo receipt and as contained in Carrier's Tariff at the time of receipt, shall apply to all shipments hereunder, notwithstanding any term of this Contract.

IX DAMAGES. Unless other wise specified in the contract, for every TEU below the MQC or sub-MQC which Shipper tenders timely to Carrier during the Term of this Contract, Shipper shall pay Carrier one hundred and fifty U.S. dollars ($150) as liquidated damages, which liquidated damages are necessary due to the difficulty of assessing the serious damage suffered by Carrier from the loss of such business. Payment to be made within thirty (30) days from the dated Carrier sends Shipper written notice of the amount due. If Carrier fails to carry containers tendered timely by Shipper, Shipper shall be entitled to a reduction in the MQC by the amount of the shortfall, or extension of this Contract by prorating the MQC over the term of this Contract and extending by an amount of time equal to the prorated portion of the Term during which such containers would have been carried. Neither party is liable for any damages other than as stated herein.

X. FILING. This Contract and amendments, and its Essential Terms, shall be filed and published, respectively, required by the FMC and shall be subject to all FMC Regulations.

XI. CONTRACT RECORDS. The Carrier's Bills of

Lading, the Shipper's statements of cargo shipped under this Contract, written communications issued by Carrier regarding such statements, and force majeure correspondence and notices, shall constitute the records supporting performance under this Contract. Any requests from the Federal Maritime Commission for shipment records under this Contract should be submitted to the Carrier at the address shown on the signature page hereof.

XII. DISPUTES/APPLICABLE LAW. The substantive law of the State of New York shall govern this Contract and the parties submit to the jurisdiction of the U.S. District Court for the Southern District of New York for all purposes. Any dispute shall be settled exclusively by arbitration at New York by a single arbitrator chosen by the parties or selected by the U.S. District Court, under the Rules of the Society of Maritime Arbitrators. The arbitrator's award may be confirmed in any court of competent jurisdiction and shall be enforceable under the United Nations Convention on the Recognition and Enforcement of Arbitral Awards of June 10, 1958.

XIII. ASSIGNMENT. Neither party may assign this Contract.

XIV. ENTIRE CONTRACT. This Contract constitutes the sole agreement between the parties concerning the subject matter, and supersedes any other agreement. Appendices —through—are incorporated herein by

reference.

XV. TERMINATION. After the MQC and sub-MQC (if any) are met, either party may terminate on ten (10) business days written notice. In the event of termination for other reasons, all shipments will be rerated as required by FMC Regulations.

XVI. CERTIFICATION. Shipper warrants that the certification of shipper status by it and all affiliates or members entitled to utilize this Contract is true and correct and any change will be communicated immediately to Carrier.

GOVERNING TARIFF: KKLU-129, 143
KLINE Standard BP
Special Terms: NO
Amendment No. 1 – Effective March 2, 2005

"Kawasaki Kisen Kaisha Ltd./SHANGAHI ELECTRIC I/E CORP."
2004 Service Contract No 13933

The following provisions of this Appendix are incorporated in the above referenced service contract. References herein to "Articles" shall refer to provisions of the above referenced service contract; references herein to "paragraphs" shall refer to provisions of this Appendix.

1. ORIGIN

   China, People's Republic of

2. DESTINATION

   USA

3. COMMODITIES

960075 GROUP A [Viz, Electric Motors & Parts]

To the extent a description of the above commodity is set forth in the governing Tariff at the time of any shipment under this Contract, those provisions are incorporated herein by reference and shall govern the description of said commodity under this Contract, subject to any exclusions or additions set forth in this paragraph.

4. MINIMUM QUANTITY OR PORTION

   200 TEUs

5. SERVICE COMMITMENTS

The service commitment applicable hereto is set forth in Article V of the Service Contract Boiler Plate

6. RATES OR RATE SCHEDULE(S)

A	B	C	D	E	F	G	H	I	J	K	M
		Origin	O-Via	Destination	D-Via	Svc	Comn	20	40	40H	Notes
		Shanghai, PRC		Los Angeles, CA		YY	A	2000	2835	3190	1,2,3
		Shanghai, PRC		Los Angeles, CA	US West Coast TP	YD	A	2265	3185	3585	1,2,3
		Shanghai, PRC		New York, NY	US West Coast TP	YY	A	3425	4735	5325	1,2,3
		Shanghai, PRC		Ashland, OH	US West Coast TP	YD	A	3295	4560	5130	1,2,3
		Shanghai, PRC		Beloit, WI	US West Coast TP	YD	A	2825	3935	4425	1,2,3
	AM1	Shanghai,		Blytheville,	US West Coast	YD	A	3045	4225	4755	1,2,3,4

	PRC	AR	TP						
	Shanghai, PRC	Chicago, IL	US West Coast TP	YY	A	2675	3735	4200	1,2,3
	Shanghai, PRC	Chicago, IL	US West Coast TP	YD	A	2750	3835	4315	1,2,3
	Shanghai, PRC	Cleveland, OH	US West Coast TP	YY	A	3110	4310	4850	1,2,3
	Shanghai, PRC	Houston, TX	US West Coast TP	YY	A	2750	3835	4315	1,2,3
	Shanghai, PRC	Houston, TX	US West Coast TP	YD	A	2825	3935	4425	1,2,3
AM1	Shanghai, PRC	Indianapolis, IN	US West Coast TP	YD	A	2825	3930	4420	1,2,3,4

AM1	Shanghai, PRC	Lebanon, MO	US West Coast TP	YD	A	2670	3725	4190	1,2,3,4
	Shanghai, PRC	Mentor, OH	US West Coast TP	YD	A	3220	4460	5020	1,2,3
	Shanghai, PRC	Lima, OH	US West Coast TP	YD	A	2695	3760	4230	1,2,3
AM1	Shanghai, PRC	Milwaukee, WI	US West Coast TP	YY	A	2615	3655	4110	1,2,3,4
	Shanghai, PRC	Nashville, TN	US West Coast TP	YD	A	3425	4735	5325	1,2,3
	Shanghai, PRC	Schaumburg, IL	US West Coast TP	YD	A	2845	3960	4455	1,2,3

"YY" = CY/CY delivery.

"YD" = CY/Door delivery. Unless otherwise specified only live-unloading is applicable.

"PC" = DRY container

Note 1:

The above contract rates are inclusive of the following charges,

- Currency Adjustment Factor
- Destination Delivery Charge
- Chassis Charge
- Shanghai Port Surcharge
- Peak Season Surcharge

but subject to all the other charges published in the governing tariff such as followings;

- Origin Terminal Handling Charge
- Alameda Corridor Charge
- Cargo Declaration Data Charge

Note 2:

The above rates are inclusive of Bunker Charge (BAF)/Fuel Adjustment Factor (FAF) at $175/D20, 230/D40 and 260/40H.

In the event BAF/FAF increase to higher than the above mentioned amount, Carrier and Shipper will review the rate level and make adjustment by mutual agreement to reflect the higher BAF/FAF.

Note 3:

Above rates are applicable via direct call services at Shanghai only.

AM1 Note 4:

AM1 The above rates are subject to Slow Season Discount of the following amount:

Slow Season Discount (US$)			
20'	40'	40H	45'
$100	$150	$170	N/A

AM1 The Slow Season Discount shall be effective from the date of filing of AM-01

AM1 through April 30th, 2005 (and applicable for PSW Direct Calling origins ONLY).

7 LIQUIDATED DAMAGES FOR NON-PERFORMANCE, IF ANY

The Liquidated damages hereunder are set forth in Article IX of Service Contract Boiler Plate.

8 DURATION OF THE CONTRACT

Duration: 12 Months

Effective Date: May 1, 2004

Expiration Date: April 30, 2005

9 SIGNATURE DATE/ CONTRACT PARTIES/ SIGNATORIES AND ANY AFFILIATES

390 Shipper: SHANGAHI ELECTRIC I/E CORP.

Affiliate(s): Nil

10 SHIPPER STATUS CERTIFICATION

BCO

11 RECORDS

The maintenance of contract records hereunder are set forth in Article XI of Services Contract Boiler Plate.

JA-200

AMENDMENT NO. 01

AGREEMENT TO AMEND "K" LINE SERVICE CONTRACT NO. 13933

WHEREAS, Shanghai Electric I/E Corp. and its related entities listed in the Appendix hereto (collectively "Shipper") entered into service contract SCNo. 13933 (the "Contract"), with Kawasaki Kisen Kaisha, Ltd ("K" Line); and

WHEREAS, the parties wish to amend the Contract as shown on the pages of the Contract attached hereto;

NOW, THERFORE, TO ALL WHOM IT MAY CONCERN, be it known that for good and valuable consideration, the receipt of which is hereby acknowledged by both Carrier and shipper have mutually agreed to amend the Contract as set forth in the attached Amendment No. 01 to the Contract. Carrier and Shipper each agree that the attached pages(s) of the Contract shall be modified as shown in the attached amendment and each shall confirm their agreement by having an authorized representative sign where indicated below and by initiating each of the modified pages of the amendment.

Carrier and Shpper further agree that Carrier shall file the above described amendment with the Federal Maritime Commission and said amendment shall become effective on the date of said filing.

(Carrier)	(Shipper)
_____	s/Wu Hong Bing
(Signature)	(Signature)
(Print Name)	Wu Hong Bing
(Title)	Vice General Manager
"K" Line America, Inc. as agent for Kawasaki Kisen Kaisha, Ltd.	Shanghai Electric I/E Corp.
Date:_____	Date: 2/3/05

PETITIONER'S BRIEF

148

No. 08-1553

IN THE

Supreme Court of the United States

KAWASAKI KISEN KAISHA, LTD. AND
"K" LINE AMERICA, INC.,
Petitioners,

v.

REGAL-BELOIT CORPORATION *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONERS

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December 23, 2009

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

BOTH 5ANY2J

QUESTION PRESENTED

Whether the Carmack Amendment to the Interstate Commerce Act of 1887, which governs certain rail and motor transportation by common carriers within the United States, 49 U.S.C. §§ 11706 (rail carriers) & 14706 (motor carriers), applies to the inland rail leg of an intermodal shipment from overseas where the shipment was made under a "through" bill of lading issued by an ocean carrier that extended the Carriage of Goods by Sea Act, 46 U.S.C. § 30701 Note, to the inland leg, there was no domestic bill of lading for rail transportation, and the ocean carrier privately subcontracted for rail transportation.

PARTIES AND RULE 29.6 STATEMENT

Petitioners Kawasaki Kisen Kaisha, Ltd. and "K" Line America, Inc. were the defendants in the district court and the appellees in the court of appeals. Union Pacific Railroad Company was also a defendant in the district court and an appellee in the court of appeals. Respondents Regal-Beloit Corporation, Victory Fireworks, Inc., PICC Property & Casualty Co., Ltd. (Shanghai Branch), and Royal Sun Alliance Insurance Co., Ltd. were the plaintiffs in the district court and appellants in the court of appeals.

Petitioner Kawasaki Kisen Kaisha, Ltd. has no parent corporation, and there is no publicly held company that owns 10% or more of its stock. Petitioner "K" Line America, Inc. is not publicly traded, and its parent corporation is Kawasaki Kisen Kaisha, Ltd.

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IN THE

Supreme Court of the United States

No. 08-1553

KAWASAKI KISEN KAISHA, LTD. AND
"K" LINE AMERICA, INC.,
Petitioners,

v.

REGAL-BELOIT CORPORATION *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONERS

OPINIONS BELOW

The amended opinion of the United States Court of Appeals for the Ninth Circuit (Pet. App. 1a-35a) is reported at 557 F.3d 985. The opinion of the United States District Court for the Central District of California (Pet. App. 36a-47a) is reported at 462 F. Supp. 2d 1098.

JURISDICTION

The Ninth Circuit entered judgment on February 17, 2009. Pursuant to an extension granted by Justice Kennedy on April 20, the petition was timely filed on June 18, 2009. This Court granted certiorari

on October 20, 2009 and has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 7 of the Carriage of Goods by Sea Act ("COGSA"), 46 U.S.C. § 30701 Note, provides:

> Nothing contained in [COGSA] shall prevent a carrier or a shipper from entering into any agreement . . . as to the responsibility and liability of the carrier or the ship for the loss or damages to . . . goods . . . subsequent to the discharge from the ship on which the goods are carried by sea.

Id. § 7; *see also* Pet. App. 48a-61a (reprinting COGSA in its entirety).

The Carmack Amendment to the Interstate Commerce Act ("Carmack"), 49 U.S.C. §§ 11706, 14706, 15906, provides:

> A rail carrier providing transportation or service subject to the jurisdiction of the Board under this part shall issue a receipt or bill of lading for property it receives for transportation under this part.

49 U.S.C. § 11706(a). Other relevant portions of Carmack and of the Interstate Commerce Act are reprinted in the petition. Pet. App. 62a-78a. Relevant portions of shipping laws in Title 46 are reprinted in the addendum to this brief. Add. 1a-16a.

STATEMENT

This case is a sequel to *Norfolk Southern Railway Co. v. Kirby*, 543 U.S. 14 (2004). The difference is that Plaintiffs here argue that Carmack applies to

maritime through bills of lading instead of state law, as in *Kirby*. The issue presented here is whether the liability and regulatory regimes for rail transportation in the "Carmack Amendment" to the Interstate Commerce Act, 49 U.S.C. § 11706, by its terms are superimposed on international ocean common carrier maritime contracts with shipper customers when they involve "through" movements from a foreign country to inland U.S. points. To accomplish such through movements, ocean container carriers like Petitioner Kawasaki Kisen Kaisha, Ltd. (" 'K' Line") subcontract with railroads and motor carriers to provide all transportation in the United States.

A. Statutory Background

Since the early part of the last century, economic regulation and liability regimes applicable to ocean carriage in foreign trade, on the one hand, and domestic rail transportation, on the other, have been governed by different statutory schemes and different administrative agencies.

1. Shipping (FMC and COGSA)

Ocean Carriage Economic Regulation—Ocean common carriers are regulated under Title 46 of the U.S. Code, which is based upon the Shipping Act of 1984, as amended, 46 U.S.C. §§ 40101-309, which replaced the Shipping Act, 1916, Pub. L. No. 64-260, 39 Stat. 728. Under the Shipping Act, the Federal Maritime Commission ("FMC" or "Commission") has responsibility for regulating common carriage in ocean foreign trade. *See* Reorganization Plan No. 7 of 1961, Pub. L. No. 88-426, 75 Stat. 840.

Yesteryear's standard method of contracting for commodity rates under carrier tariffs has been

eclipsed in favor of annual or multi-year individual "service contracts" between ocean carriers and cargo shippers. Tariffs are relegated to an ancillary role, supplying applicable rules and some charges. 46 U.S.C. §§ 40501-02. The Shipping Act of 1984 and the Ocean Shipping Reform Act of 1998 changed the regulatory environment, but maintained the Commission as the only regulator of common carriage in ocean foreign commerce under the 1984 Act, as amended.[1] *See* Ocean Shipping Reform Act of 1998, Pub. L. No. 105-258, §§ 110, 112, 115, 112 Stat. 1902, 1912 (codified at 46 U.S.C. App. §§ 1710-14). Thus, while ocean common carriers still assume responsibility for cargo from receipt to delivery in accordance with applicable maritime law such as the Carriage of Goods by Sea Act ("COGSA"), ch. 229, 49 Stat. 1207 (reprinted in the Note following 46 U.S.C. § 30701), the vast majority of packaged cargo carriage is under individually negotiated "service contracts," to the exclusion of tariff rates. World Shipping Council *Amicus* Br. at 8.

All ocean common carrier service contracts in U.S. foreign trade are regulated by the FMC as to form, content, filing, amendment, correction and cancellation. *See* 46 U.S.C. § 40502; 46 C.F.R. part 530 *passim*; *see also* FEDERAL MARITIME COMMISSION, 47TH ANNUAL REPORT FOR FISCAL YEAR 2008, at App. D, *available at* http://www.fmc.gov/UserFiles/pages/File/Annual_Report_FY_2008.pdf (noting 44,438 new service contracts and 294,880 amendments in fiscal

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[1] "Common carriage" under the Act and its predecessors is defined by "holding out" to the shipping public to carry cargo and take responsibility for it. 46 U.S.C. § 40102(b). The Act is limited to economic regulation and has never specified any particular liability regime.

year 2008). "Essential terms" of every contract, and applicable tariffs supplementing the contracts, must be published. 46 C.F.R. §§ 520.3, 530.12. To be effective, all terms of service contracts and amendments must be filed with the FMC. *Id.* § 530.8.

The FMC does not dictate the terms of the individual shipment contracts evidenced by ocean carrier bills of lading, but the terms and their implementation are subject to the prohibitions on carrier acts in the Shipping Act. *See* 46 U.S.C. § 41102-06. The Shipping Act requires bill of lading terms to be included in tariffs published by the ocean carriers, as must all non-service contract rates (including "through" rates for delivery beyond the port), charges or anything affecting their levels. *See id.* § 40501(a) & (b).

Ocean Carriage Liability Terms—Liability for cargo loss or damage during ocean carriage in foreign trade is governed by COGSA, 46 U.S.C. § 30701 Note, which was enacted in 1936, ch. 229, 49 Stat. 1207. COGSA "regulates the terms of ocean carriage by the indirect but highly efficacious device of dealing with the terms of the ocean bill of lading." GRANT GILMORE & CHARLES BLACK, JR., THE LAW OF ADMIRALTY § 3-25, at 145 (2d ed. 1975). COGSA requires ocean carriers to issue bills of lading, 46 U.S.C. § 30701 Note § 3(3), and it defines the rights of ocean carriers and their responsibilities for the cargoes they carry. *Id.* §§ 2-4. Liability under COGSA is largely based upon fault, *see id.* § 4(1)-(2); *see generally* THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW 88, 104-06 (2d ed. 1994), and it is limited to $500 per package unless a declaration of the value of the cargo by the shipper is inserted into the bill of lading. 46 U.S.C. §30701 Note § 4(5). COGSA also permits

parties to enter into forum selection clauses. *See Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 537-39 (1995).

By its terms COGSA applies "tackle to tackle," that is, from the time cargo is loaded onto a ship to the time it is discharged from the ship. 46 U.S.C. § 30701 Note § 1(e). COGSA, however, permits carriers to enter into agreements concerning liability for loss or damage to goods "prior to the loading on and subsequent to the discharge from the ship on which the goods are carried by sea." *Id.* § 7. Thus, COGSA gives parties the option to extend its provisions by contract to the domestic leg of an overseas shipment. *See Kirby*, 543 U.S. at 29.

2. Railroads (STB and Carmack)

Rail Carriage Economic Regulation—The Surface Transportation Board (hereinafter "STB" or "Board") is the regulatory successor of the Interstate Commerce Commission, which was created in 1887 to regulate rail transportation. Interstate Commerce Act, ch. 104, § 11, 24 Stat. 379, 383 (1887). The STB has exclusive jurisdiction over transportation by rail carriers in the United States. 49 U.S.C. § 10501(b). It also has non-exclusive jurisdiction over motor carrier transportation, *id.* § 13501, and transportation by water carriers inside the United States or from one place to another place in the United States, *id.* § 13521(a); *see also id.* § 13521(b) (defining "United States" to include territories and possessions). The STB has no jurisdiction over the international transportation by ocean carriers regulated by the Federal Maritime Commission.

Rail Carriage Liability Terms—Liability terms during rail carriage are regulated by the Carmack

Amendment to the Interstate Commerce Act. Carmack regulates the liability of rail carriers "providing transportation or service subject to the jurisdiction of the Board under this part," 49 U.S.C. § 11706(a), which is Part A of Subtitle IV of Title 49, Pet. App. 27a n.15. Just as COGSA requires ocean carriers to issue bills of lading, Carmack requires rail carriers providing transportation subject to the STB's jurisdiction to issue receipts or bills of lading for property received "for transportation under this part." 49 U.S.C. § 11706(a). Unlike COGSA, however, Carmack imposes upon receiving carriers (and delivering carriers as well) essentially strict liability to the holder of the bill of lading for loss or injury to property caused by a carrier transporting the property under the bill. *See, e.g.*, *Rankin v. Allstate Ins. Co.*, 336 F.3d 8, 9 (1st Cir. 2003). *But see Mo. Pac. R.R. Co. v. Elmore & Stahl*, 377 U.S. 134, 137-38 (1964) (noting defenses to liability). Carmack also restricts contractual limitations on liability, 49 U.S.C. § 11706(c), and restricts the venue of actions under the Amendment, *id.* § 11706(d). Carmack has no provision like Section 7 of COGSA addressing international intermodal through transportation.

Rail carriers may opt out of Carmack by contract. In 1980, Congress amended the Interstate Commerce Act to permit rail carriers to contract to provide specified services under specified rates and conditions. Staggers Rail Act of 1980, Pub. L. No. 96-448, § 208(a), 94 Stat. 1895, 1908 (1980) (codified at 49 U.S.C. § 10709(a)). The only duties of a rail carrier entering into such contracts are those specified by the contract. 49 U.S.C. § 10709(b). In addition, such contracts are not subject to Part A and may not be challenged on the ground that they violate provisions in that part. *Id.* § 10709(c).

B. Factual Background

"K" Line operates in United States trade as an ocean common carrier by water in U.S. foreign commerce (Federal Maritime Commission Vessel Operating Common Carrier Organization Number 001466). FEDERAL MARITIME COMMISSION, VESSEL OPERATING COMMON CARRIERS, https://www2.fmc.gov/FMC1Users/scripts/ExtREports.asp?tariffClass=vocc. "K" Line operates no other service, foreign or domestic, so it chooses motor and rail carrier subcontractors, in its discretion, to deliver cargo to inland points. *See, e.g.*, JA 145 (¶5(2)), JA 146 (¶6); *see also Kirby,* 543 U.S. at 21 (describing similar arrangement between an ocean carrier and a rail carrier). "K" Line is the eleventh-largest containership operator in United States foreign trade. THE JOURNAL OF COMMERCE, Dec. 7, 2009, Vol. 10, No. 48 at 32.

1. General Containerized Shipping Practices

"K" Line's containers (like all ocean containers, whether the ocean carrier's or the shipper's) are specially designed and constructed for ocean transportation on vessels—which normally carry only containers because they are fitted with guides to hold them—and are universally interchangeable among ocean container operators. They are also susceptible to inland movement by barge, rail, or truck. These containers do move throughout U.S. foreign trade by all three modes, under ocean common carrier through bills of lading similar to "K" Line's. *See, e.g.*, ALEX ROLAND ET AL., THE WAY OF THE SHIP: AMERICA'S MARITIME HISTORY REENVISIONED 1600-2000, at 347, 350, 351 (2008); *see also* MARC LEVINSON, THE BOX: HOW THE SHIPPING CONTAINER MADE THE WORLD SMALLER AND THE WORLD ECONOMY BIGGER 127-49 (2006) (reviewing the development of standard

containers). Ocean carrier containers are designated for Customs purposes as "instruments of international traffic," and as such are exempt from taxes and duties. *See* 19 U.S.C. § 1332(a); 19 C.F.R. § 10.41a(a). They are extensions of the containership, since they are integral to cargo carriage by the containership. *See* LEVINSON, THE BOX 53-67, 212-23; *Ne. Marine Terminal v. Caputo*, 432 U.S. 249, 269 (1977) ("the container is a modern substitute for the hold of the vessel"); *Leather's Best, Inc. v. S.S. Mormaclynx*, 451 F.2d 800, 815 (2d Cir. 1971) (containers are "functionally a part of the ship").

Virtually all packaged cargo in foreign trade ocean commerce moves in containers specially designed for the purpose. *See generally* LEVINSON, THE BOX 1-15, 24-27. This trade is referred to as "containerized" or "liner" (regular, scheduled) service. *See, e.g.*, 46 C.F.R. § 520.2. Through movements, under single bills of lading and often "door-to-door" in one ocean container, were facilitated by the container revolution of the sixties. The seamless international transportation afforded by the intermodal system of moving containerized cargo is of inestimable value to commerce, by reducing costs, transit time, and pilferage. *See* ROLAND ET AL., THE WAY OF THE SHIP 351-52; LEVINSON, THE BOX 1-15.

2. Service Contracts

Ocean common carriage is performed by vessel-operating common carriers ("VOCCs"),[2] almost exclu-

[2] Middlemen called "non-vessel operating common carriers," or "NVOCCs," also contract with shippers, issue their own "house" bills of lading, and in turn contract with the vessel operators for actual carriage under service contracts. *See Rexroth Hydraudyne, B.V. v. Ocean World Lines, Inc.*, 547 F.3d 351, 357 (2d Cir. 2008); *see also* 46 U.S.C. § 40102(6) & (16).

sively under rates contained in FMC-regulated service contracts. World Shipping Council *Amicus* Br. at 8. Service contracts routinely cover dozens, even hundreds, of commodities of widely disparate value. *Id.* at 8-9. The total 2008 movement of containerized cargoes in U.S. foreign trades was 305 million "TEUs." *See* FEDERAL MARITIME COMMISSION, 47TH ANNUAL REPORT, *supra*, at 31; *see also* LEVINSON, THE BOX 213 n.* (noting that TEUs are "20-foot equivalent units"). Carriage under "through intermodal" bills of lading to/from points beyond ports makes up a large portion of the containerized movement total. *See, e.g.*, *Kirby*, 543 U.S. at 25-26.

As in the case of the four service contracts between "K" Line and its shipper customers in this case, the service contract rates charged shipper customers by ocean container carriers are usually per container, JA 193 (¶3), JA 194-95 (¶6), but those rates are to some degree commodity-derived, JA 193 (¶3). They are negotiated for the full contract term before any service contract is filed and effective, not as each shipment is tendered to the carrier. *See, e.g.*, JA 199 (¶8).

Shipping rates depend in part upon the scope of the ocean carrier's liability for loss or damage during carriage and the cost of insuring against such liability. *See Kirby*, 543 U.S. at 35 ("[I]f liability limitations negotiated with cargo owners were reliable while limitations negotiated with intermediaries were not, carriers would likely want to charge the latter higher rates."). Ocean carriers are insured by "P&I" (protection and indemnity) "clubs," which are made up of groups of ocean carriers themselves. To obtain insurance beyond COGSA limits under a service contract, ocean carriers must present to the relevant club identification of each commodity and its

volume expected to be carried under that service contract. *See generally* P&I Club *Amicus* Brief.

3. Rail Contracts

"K" Line entered into a long-term "Exempt Rail Transportation Agreement" which incorporated UP's Master Intermodal Transportation Agreement (collectively, "the Rail Agreement") as Shipper[3] with Petitioner Union Pacific Railroad ("UP") as Carrier, effective from August 1, 2003 to July 31, 2008. JA 120-136; Pet. App. 16a-20a. It is critical to differentiate this railroad transportation contract from the maritime contracts "K" Line makes for through transportation with its shipper customers, which the court below did not appear to do.

UP agreed to "provide rail transportation" on its "double-stack" trains for ocean containers delivered to it by "K" Line, moving to or from overseas and points in the United States, using exclusively UP "railcar equipment." JA 121-22 (§ 14G). "K" Line furnishes no equipment to be used for the double-stack transport of its ocean containers by UP. Its truck chassis may be used by motor carriers to deliver the containers to UP and to customers from the UP terminal after rail carriage. *Id.* The ocean containers are not necessarily "K" Line's: shippers are free to

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[3] "K" Line's General Agent, Petitioner "K" Line America, Inc. ("KAM") was recognized in the Agreement as an arranger of the rail transportation for "K" Line, the person "furnishing inland transportation service under its through bills of lading." JA 120. KAM is not an ocean carrier under the Shipping Act and Commission regulations, so it cannot contract as such. *See* 46 C.F.R. §§ 530.2, 530.3(n),(q). KAM acted only as an agent for a disclosed principal in this case, JA 143 (¶1(b)), JA 145 (¶5(2)), and hence it has no role in this controversy.

use their own containers, as contemplated in "K" Line's bill of lading. JA 146 (¶11).

The Rail Agreement's rates were on a flat per-container basis, regardless of what shipper or overseas origin might be involved. JA 121 (§ 5); Pet. App. 118a. It set a $250,000 per-unit or $10,000 per package cap on the UP's cargo liability. JA 132 (§ 3.1.C.3). "K" Line as the contracting shipper abandoned any rights under Carmack, and committed to ship via UP a percentage of the ocean containers it moved in rail corridors served by UP. *See generally* JA 120 (¶2), JA 132-133. Thus, the Agreement was a "requirements" contract, which did not become effective as to any particular container until "K" Line delivered it to UP.

4. The Shipments In This Case

Four service contracts ("the Service Contracts") were made in 2004, between "K" Line and four cargo shippers in Asia ("the Shippers"), who are either respondents here or subrogors of the two insurer respondents. Pet. App. 2a n.1. Each was for one year but some were extended to later dates. JA 183-201. The Service Contracts covered transportation of many listed commodities from Asian origins to U.S. ports or inland destinations, contained all the terms required by the Shipping Act and FMC regulations, JA 183-201, and were filed with the FMC as required, JA 190 (¶X). The Service Contracts did not offer rail carriage or motor carriage; they specified no mode of inland transportation for through movements. JA 188 (¶IV(B)). They incorporated the terms of "K" Line's standard bill of lading form. JA 190 (¶VIII).

Under the terms of the umbrella Service Contracts, the Shippers loaded the cargoes in this case into "K" Line ocean vessel containers ("the Containers"), and delivered them with cargo descriptions to "K" Line. JA 117-118 (¶¶6-12). At this point in the movements, "K" Line had the contractual right under its bill of lading terms, *see* JA 156 (¶5(1)), to subcontract to move the containers inland from the port of discharge by the ocean vessel via any mode (or modes) of surface carriage it chose. JA 157 (¶¶6(a)-(c)). The published bill of lading terms apply automatically, even if a physical bill of lading is never actually issued. *See Caterpillar Overseas, S.A. v. Marine Transp., Inc.*, 900 F.2d 714, 718 (4th Cir. 1990). When containers arrive at the discharge port, "K" Line always has the right under through bills to use any combination of truck, rail, or water transport to deliver them to their ultimate destination. "K" Line is free to discharge the containers at some other discharge port and subcontract for trucking all the way to destination. JA 157 (¶¶ 6(a)-(c)).

A "K" Line Combined Transport Bill of Lading (a "Through Bill") was issued for each shipment, JA 137-82, covering the through transport from Asia to inland U.S. points. The Through Bills, together with applicable tariffs published under the Act and Commission Regulations, and the Service Contracts described herein, constituted the complete transportation contracts between "K" Line and each Shipper customer. *See* JA 187 (¶ II), JA-190 (¶ VIII).

The Through Bills contained five particularly pertinent provisions. Clauses 4(1) and 4(3) extended COGSA to the inland leg of the through transportation, with its $500 per package cargo liability limitation, JA 144-45 (¶¶4(1) & 4(3)); Clause 5(1) autho-

rized "K" Line to subcontract all or part of the transportation to other carriers on any terms, JA 145 (¶5(1)); Clause 5(2) extended all defenses under the Through Bills to any subcontractor, JA 145 (¶5(2)); and Clause 6 gives "K" Line the right to choose any method (land, water or air) or route to transport the cargo. JA 146 (¶6). Finally, there was a forum selection clause, requiring actions relating to the carriage to be brought in Tokyo District Court, JA 144 (¶ 2), which gave rise to this case.

The Containers were discharged and delivered to UP for rail carriage to Chicago. Pet. App. 3a. Their trip was truncated in Tyrone, Oklahoma where the train crashed, damaging cargo (including Plaintiffs') in "K" Line containers aboard 36 Union Pacific rail cars. *Id.*

C. Proceedings Below

Plaintiffs, two of the Shippers and insurers for the remaining two Shippers, sued UP, "K" Line and KAM for cargo damage, negligence and breach of contract in California state court. Pet. App. 2a, 3a. After UP removed the case to federal court, "K" Line and KAM moved to dismiss under the Tokyo forum selection clause in their Through Bills. UP joined in the motion. The district court granted the motion and dismissed plaintiffs' claims. Pet. App. 47a.

Specifically, the district court found that the plaintiffs would not suffer any undue inconvenience if the Tokyo forum selection clause were enforced and that the clause was therefore enforceable under COGSA, which the parties had agreed would cover the inland leg of the shipments. Pet. App. 41a-42a. In addition, the court rejected plaintiffs' argument that Carmack applied and barred enforcement of the forum selection clause because, the court found, the

parties had entered into a contract under 49 U.S.C. § 10709 and therefore were excused from Carmack's requirements. Pet. App. 45a-47a.

The Ninth Circuit reversed based upon three rulings that in "K" Line's view are erroneous. *First*, the Ninth Circuit held that "K" Line, an ocean carrier, is a "rail carrier" for purposes of Carmack. Pet. App. 12a-17a; *see also* 49 U.S.C. § 11706(a) (regulating the liability of a "rail carrier providing transportation or service subject to the jurisdiction of the [STB]"). The court of appeals based this holding upon the Interstate Commerce Act's definition of rail carrier, which is "a person providing common carrier railroad transportation for compensation," 49 U.S.C. § 10102(5), and its definition of railroad, as "includ[ing]. . . "intermodal equipment used by or in connection with a railroad," *id.* § 10102(6)(A). Finding that "K" Line had arranged for transportation by railroad and water "via 'intermodal equipment,'" the court concluded that "K" Line had provided railroad transportation and therefore qualified as a rail carrier under Carmack. Pet. App. 12a-13a. The Ninth Circuit did not identify the intermodal equipment supposedly employed by "K" Line, but presumably thought the ocean containers qualified as such, those containers being the only "K" Line equipment involved. The Ninth Circuit did not explain the leap it made in holding "K" Line's agent, KAM, to be a rail carrier.

Second, the Ninth Circuit held that Carmack applies to shipments from foreign countries into the United States under through bills of lading. Pet. App. 17a-19a. Although the court of appeals recognized that four circuits had held otherwise, it declined to follow those decisions. Pet. App. 17a-18a. Accord-

ing to the Ninth Circuit, these decisions in other circuits had rested on the false notion that the STB lacks jurisdiction over through bills of lading for transportation from foreign countries. Pet. App. 18a. The Ninth Circuit rejected these decisions on the ground that the STB has jurisdiction over all rail transportation in the United States and because "Carmack's reach is coextensive with the [STB's] jurisdiction." Pet. App. 18a. The Ninth Circuit did not explain why it held Carmack to be coextensive with the STB's jurisdiction.

Third, the Ninth Circuit held that the district court erred in applying Section 10709 because that Section does not apply to exempt transportation, and it remanded to determine whether "K" Line had offered Carmack-compliant terms to the Shippers. Pet. App. 26a-35a. The court of appeals offered little explanation of this offer requirement or why the offer should be made to the Shippers by "K" Line, which did not promise to provide rail transportation, and not to "K" Line by UP, which contracted to provide such transportation.

The Ninth Circuit, in its lengthy discussion, failed to distinguish between the two entirely separate contracts in the fact pattern, which may have been the root of its error. The railroad made the long-term Rail Agreement (composed of the "ERTA/MITA") with its shipper customer "K" Line, while "K" Line made the Service Contract/Bill of Lading package of maritime contracts with its shipper customers. *See* Pet. App. 30a.

SUMMARY OF ARGUMENT

In *Norfolk Southern Railway Co. v. Kirby*, 543 U.S. 14 (2004), this Court considered a shipment

that, like the ones here, involved substantial carriage of goods by sea from a foreign country under through bills of lading extending the terms of the Carriage of Goods by Sea Act ("COGSA"), 46 U.S.C. § 30701 Note, to the inland portion of the shipment. Finding the contract was maritime in nature due to the substantial ocean carriage, and noting the benefits of applying uniform liability rules to through shipments and the efficiency of COGSA's default rules, 543 U.S. at 28-29, this Court affirmed the coverage of federal law, including COGSA, against state law-based challenges to COGSA liability limits, *see id.* at 22-24, 30-35. This case is another side of the *Kirby* coin, with a choice between two federal statutes.

In this case, plaintiffs challenged the application of a forum selection clause that is indisputably proper under COGSA on the ground that the inland leg of the through shipments in this case is governed by the Carmack Amendment to the Interstate Commerce Act, 49 U.S.C. § 11706, which does not permit forum selection clauses. The Ninth Circuit upheld this challenge, holding that "K" Line is a "rail carrier" for purposes of Carmack; that Carmack applies to the domestic portion of through shipments from foreign countries; and that neither the ocean carrier's contracts with its shippers nor the ocean carrier's contract with the rail carrier excused them from Carmack.

The Ninth Circuit erred in these rulings. For no less than three main reasons, Carmack does not apply to ocean carriers such as "K" Line or to through shipments from foreign countries involving substantial ocean transportation.

1. Carmack does not apply to "K" Line because "K" Line is not a "rail carrier." Carmack applies only to

rail carriers providing transportation subject to the jurisdiction of the STB under the rail part of the Interstate Commerce Act. Because "K" Line neither owns nor operates a railroad (or any part of one), it is not a "rail carrier" and does not provide transportation subject to the STB's jurisdiction.

The Ninth Circuit reached the odd conclusion that "K" Line, an ocean carrier, is a rail carrier because the definitions applicable to Carmack state that the word "railroad" "includes" intermodal equipment used by or in connection with a railroad. Thus, under the decision below, any entity controlling intermodal equipment—which under the decision appears to include the ubiquitous containers used in modern intermodal transportation—qualifies as a railroad and is subject to Carmack. That is not the law. To qualify as a rail carrier, an entity must actually conduct rail operations, which "K" Line does not.

Compounding its error, the Ninth Circuit's expansive view of Carmack would throw the regulatory structure covering through transportation into confusion. For nearly a century, the FMC and its predecessors have regulated ocean carriage while the STB and its predecessors have regulated ground transportation and domestic water carriage. Under the decision below, however, ocean common carriers providing through transportation would be converted to "rail carriers" subject to the STB's jurisdiction, which conflicts with the FMC's authority because the STB's jurisdiction over rail carriers is exclusive. This impact on transportation regulation is gratuitous and unnecessary.

2. Carmack does not cover through shipments from foreign countries. Carmack applies only to property received for transportation under the rail

part of the Interstate Commerce Act, which covers only domestic rail transportation. The cargo in this case was received for through shipment from China, and this Court recognized in *Kirby* that through bills of lading with substantial ocean carriage are maritime contracts governed by maritime law. Indeed, "K" Line had no obligation to use rail for the domestic leg of these shipments: its contracts with the shippers left the mode of domestic transportation to "K" Line's discretion. Thus, an ocean carrier providing through transportation from abroad is not subject to Carmack.

This conclusion comports with the purpose of Carmack. That purpose was to relieve shippers whose cargo was lost or damaged during shipment of the burden of determining which of the multiple carriers involved in the shipment was responsible. As this Court recognized in *Atlantic Coast Line Railroad Co. v. Riverside Mills*, 219 U.S. 186 (1911), Carmack accomplishes this by effectively requiring the carrier receiving the cargo to provide through carriage. When an ocean common carrier provides through carriage, the shipper is relieved of this burden by the ocean carrier's common carrier liability throughout the entire through movement. There is no need to apply Carmack to ocean carrier through carriage.

3. The inland portion of through shipments is governed by COGSA, rather than Carmack. Section 7 of COGSA explicitly addresses liability for through shipments from foreign countries by authorizing parties to agree upon an ocean carrier's liability for inland transportation. Imposing Carmack's stringent liability terms on the rail segment of ocean carrier through shipments would nullify Section 7 as to those

segments. Stretching the boundaries of one statutory scheme to undercut another that applies explicitly cannot be justified.

Yet another negative impact of the decision below is that applying Carmack to the inland portion of ocean carrier through shipments would upset established shipping practices and increase the cost of the seamless through transportation that has been tremendously beneficial to world trade. As this Court recognized in *Kirby*, COGSA contains efficient default rules for international shipping. Application of Carmack in place of those rules would increase ocean carrier costs, notably insurance costs, and foment litigation. Requiring an offer of Carmack terms effectively requires ocean carriers to offer insurance for the manifold cargoes they carry under their long-term service contracts. Ocean carrier cargo risks are insured by mutual "clubs" of ocean carriers, which insure on the basis of the existing liability structure. These clubs are not in any way equipped to insure the full value of the world of commodities moving in ocean carrier through movements, and the ocean carriers are not equipped to micro-manage such risk.

4. Finally, the language of the Amendment prior to the 1978 recodification of Carmack bars its application to ocean carrier through movements. Prior to recodification, Carmack stated it applied only to domestic transportation or transportation "from a point in one state to a point in another State," 49 U.S.C. § 20(11) (1976), and therefore Carmack did not apply to through shipments from foreign countries. In recodifying the Interstate Commerce Act in 1978, Congress stated the revisions "may not be construed as making a substantive change." Act of Oct. 17, 1978, Pub. L. No. 95-473, § 3(a), 92 Stat. 1337, 1466.

This caveat forbids a change from the pre-recodification interpretation that Carmack does not apply to such shipments.

The brief filed by the Union Pacific Railroad demonstrates the error by the Ninth Circuit regarding application of the so-called "opt-out" provisions which come into play under Carmack.

ARGUMENT

I. CARMACK IS INAPPLICABLE TO ANY THROUGH TRANSPORTATION UNDER MARITIME CONTRACTS

In 1906, Congress added the Carmack Amendment to the Interstate Commerce Act ("Carmack") to require rail carriers receiving property for transportation to provide shippers the benefits of through carriage. *See* Pub. L. No. 59-377, § 7, 34 Stat. 584, 593-95 (1906) (currently codified at 49 U.S.C. § 11706); *see also Atl. Coast Line R.R. Co. v. Riverside Mills*, 219 U.S. 186, 198 (1911) (discussing Carmack's practical effect). In the decision below, the Ninth Circuit extended Carmack to apply to an ocean carrier offering through transportation from a foreign country under a maritime contract. This disregards the limited purpose of Carmack, and contradicts the language of the Amendment restricting its operation to rail carriers and domestic rail transportation. If allowed to stand, this decision would undermine the structure of regulatory and liability regimes governing surface transportation, subjecting ocean carriers to regulation under two different and contradictory statutory schemes, and disrupting efficient shipping practices.

A. "K" Line, An Ocean Common Carrier, Is Not A Carmack Rail Carrier Subject To STB Jurisdiction.

The Ninth Circuit shoehorned "K" Line into Carmack inland coverage by deeming "K" Line to be a "rail carrier" under the Interstate Commerce Act because, in offering through transportation from China, "K" Line subcontracted with a railroad for part of the ground transportation leg. This ruling conflicts with the plain language of Carmack, which applies only to a "rail carrier" that provides transportation subject to the jurisdiction of the STB. Treating ocean carriers such as "K" Line as "rail carriers" would undermine the established distribution of authority between the STB and the FMC, potentially subjecting "K" Line and all ocean common carriers to a whole new set of regulatory obligations.

Carmack Terms—Carmack's language contains no hint that it applies to international ocean common carriers. Statutory interpretation "begins with the plain language of the statute." *Jimenez v. Quarterman*, 129 S. Ct. 681, 685 (2009). "And where the statutory language provides a clear answer, it ends there as well." *Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 254 (2000) (quotation marks and citations omitted).

Carmack imposes liability upon rail carriers that provide domestic rail transportation. Carmack requires a "rail carrier providing transportation or service subject to the jurisdiction of the Board under this part" to issue a bill of lading for property it receives, 49 U.S.C. § 11706(a), and it makes "[t]hat rail carrier" and any delivering carrier "providing transportation or service subject to the jurisdiction of the Board under this part" liable for any loss caused

by a rail carrier transporting the property, *id.* Thus, Carmack imposes liability upon "rail carriers" that provide transportation subject to the jurisdiction of the "Board under this part"—that is, the jurisdiction of the STB, *see id.* § 10102(1) (defining "Board" to mean the "Surface Transportation Board"), under Part A of Subtitle IV of the Transportation Code, the "Rail" part, *see id.* §§ 10101-11908, which states that the Board's jurisdiction over rail transportation "applies only to transportation in the United States," *id.* §10501(a)(2).

"K" Line falls outside this clearly defined scope. First, "K" Line is not a rail transportation provider and has no railroad equipment. For purposes of Carmack, a rail carrier is a person "providing common carrier railroad transportation for compensation." 49 U.S.C. § 10102(5). There is, however, no allegation or evidence that "K" Line operates any railroad or offers to perform any railroad transportation. To the contrary, as plaintiffs acknowledged in their Service Contracts, "K" Line is an ocean common carrier, JA 183, and the only transportation that it provided was ocean transportation: it shipped plaintiffs' cargo by sea from China to Long Beach. JA 117-118 (¶¶ 6-11).

The STB Has No Jurisdiction Over Foreign Trade Ocean Carriage—Second, "K" Line is not subject to the jurisdiction of the STB because the Board has no jurisdiction over ocean carriage in foreign trade. The Board has jurisdiction over transportation that is "by railroad and water" where, as here, that transportation is under an arrangement for "continuous carriage or shipment." 49 U.S.C. § 10501(a)(1)(B). That jurisdiction, however, is only "over transportation by rail carrier," *id.* § 10501(a)(1), and it applies

"only to transportation in the United States," *id.* § 10501(a)(2). Thus, the Board does not have jurisdiction over ocean carriage in foreign trade, and therefore it has no jurisdiction over an ocean carrier such as "K" Line that provides no domestic water carriage. *See, e.g.*, *Rexroth Hydraudyne B.V. v. Ocean World Lines, Inc.*, 547 F.3d 351, 357 n.6 (2d Cir. 2008). *Rexroth* offers a clear and authoritative analysis supporting the inapplicability of Carmack to international through carriage by ocean carriers.

The STB has jurisdiction over domestic water carriage. *See* 49 U.S.C. § 13521(a)(3) (granting jurisdiction over transportation by water carrier "between a place in the United States and a place outside the United States"). But this jurisdiction does not extend to water carriage in foreign trade. Where a water carrier provides transportation from outside the United States, the STB's jurisdiction covers only transportation "from a place in the United States to another place in the United States after transshipment to a place in the United States from a place outside the United States." *Id.* § 13521(a)(3)(C). Water carriage in foreign trade—that is, ocean carriage—is the province of the FMC. *See Rexroth*, 547 F.3d at 357 ("The Federal Maritime Commission (FMC), and not the STB, regulates ocean shipping between the United States and foreign countries . . . .").

Subcontracting Does Not A Rail Carrier Make—"K" Line did not become a rail carrier subject to the STB's jurisdiction by subcontracting for rail transportation as part of an intermodal shipment. The Ninth Circuit held that, in arranging for a railroad to carry these cargoes for part of their inland journey, "K" Line acted as a rail carrier subject to the Board's jurisdiction and therefore subject to Carmack. Pet.

App. 12a-17a. This misconstrues the scope of the term "rail carrier" and the Board's jurisdiction.

The Ninth Circuit noted that "Carmack applies to '[a] rail carrier providing transportation or service subject to the jurisdiction of the Board.'" Pet. App. 12a (quoting 49 U.S.C. § 11706(a)). Then it held "K" Line to be a "rail carrier" because "K" Line provides "common carrier railroad transportation for compensation." *Id.* (quoting 49 U.S.C. § 10102(5)). At this point, its analysis derailed. It avoided the fundamental question whether "K" Line provided "common carrier railroad transportation" and diverted to the Carmack definition of "railroad." It never explained how an ocean vessel operator provides common carrier railroad transportation when that operator never offered or promised to provide rail transportation to its customers and is incapable of providing such transportation.

Transferring Ocean Containers To A Railroad Is Not Railroad Transportation—The court below seeks to substitute the transfer of ocean containers to an actual railroad for transportation under subcontract for the providing of "common carrier railroad transportation." The court's apparent assumption was that "K" Line's ocean container was "intermodal equipment used by or in connection with a railroad." But it cannot be divined how this railroad use of "K" Line's container qualifies "K" Line as providing railroad transportation in this case.

The "common carrier railroad transportation" that qualifies one as a "rail carrier" is in no way related to the list of ancillary "railroad" accessories in 49 U.S.C. § 10102(6)(A). There is no connection. Even if an ocean container were deemed to be "intermodal equipment" used by UP, this has no

bearing on whether "K" Line is a "rail carrier," any more than it bears on whether a cargo shipper who furnishes the container is a "rail carrier." Handing the container off to the railroad cannot be the key point identifying a "rail carrier."

The Ninth Circuit incorrectly assumed that an entity furnishing "intermodal equipment," at least in connection with intermodal transportation involving a railroad, is a railroad. Part A, however, states only that the term "railroad" "*includes* . . . a bridge, car float, lighter, ferry, and intermodal equipment used by or in connection with a railroad." 49 U.S.C. § 10102(6) (emphasis added). In other words, the definition expands the word "railroad" to encompass bridges, ferries, and other equipment that facilitate railroad operations, as well as the locomotives and cars that are normally understood to come within the definition of a "railroad." Part A does not make a bridge a "railroad," only a functional component of a railroad when it is a railroad-carrying bridge.

An ocean carrier that operates no locomotives or rail cars does not become a railroad because a railroad carries its containers. If this were so, every trucker who loads his trailers on railcars for part of his haul would be a railroad, as would freight forwarders or even actual cargo owners who deliver their own containers to the railroad for carriage. Defining a "rail carrier," the Board took the sensible tack, contrary to the court below, that one must "conduct rail operations" to be a "railroad." *Ass'n of P&C Dock Longshoremen*, 8 I.C.C.2d 280, 290 (Surface Transp. Bd. 1992).

The Ninth Circuit did not consider whether "K" Line provides railroad transportation as a common carrier. Part A defines the term rail carrier to mean

a person "providing *common carrier* railroad transportation." 49 U.S.C. § 10102(5) (emphasis added). A common carrier is a carrier "offering service to all comers." WEBSTER'S THIRD NEW INT'L DICTIONARY 458 (2002). "K" Line's Service Contracts and Bills of Lading offered no railroad transportation. The Service Contracts do not mention rail transportation, and the Bills of Lading obligate "K" Line only to somehow get the cargo to the inland destinations by any means "K" Line chooses. *See, e.g.*, JA 146 (¶6); JA 188 (¶IV.B). Again, *Rexroth* is perfectly on point. *See* 547 F.3d at 351.

The Carmack Venue Provisions Are Incompatible With Through Transportation—Congress has implicitly recognized that Carmack does not apply to through shipments from foreign countries. In 1980, Congress added a venue provision to Carmack. *See* Staggers Rail Act, Pub. L. No. 96-448, §211(c), 94 Stat. 1895, 1911 (1980) (codified at 49 U.S.C. § 11706(d)). That provision states that a civil action under Carmack may be brought against the originating or receiving rail carrier "in the judicial district in which the point of origin is located." 49 U.S.C. § 11706(d)(2)(A)(i). The term judicial district is defined to mean either "judicial district of the United States" or the "geographic area over which [a state] court exercises jurisdiction." *Id.* § 11706(d)(2)(B). But when an ocean carrier such as "K" Line ships cargo from a foreign country, the point of origin for the transportation is not in a judicial district of the United States or within the geographic boundary of a state court. Thus, when Congress enacted Carmack's venue provision in 1980, it plainly assumed that Carmack applies only to goods received for shipment within the United States.

Carmack Coverage Would Pit FMC Jurisdiction Against STB Jurisdiction—Treating "K" Line as a rail carrier would upset long established administrative jurisdiction. Ocean common carriers have been regulated solely by the FMC and its predecessors since 1916, and rail carriers by the STB and its predecessors since 1896. *See supra* pp. 3-5. Title 49 gives the STB "exclusive" jurisdiction over "transportation by rail carriers." 49 U.S.C. § 10501(b). The remedies provided under the rail part of Subtitle IV "with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law." *Id.* Thus, if "K" Line and other ocean carriers providing through transportation were deemed "rail carrier[s] providing transportation or service subject to the jurisdiction of the Board" under the rail part, purportedly the Board, not the FMC, would have exclusive jurisdiction over through transportation by ocean carriers—an irreconcilable conflict with the Shipping Act. This sudden shift would hit the international shipping community like a rogue wave.

The FMC has always exercised exclusive regulatory jurisdiction over through intermodal carriage by ocean common carriers. For example, the tariff regulations promulgated by the FMC cover all transportation by ocean common carriers, "including through transportation with inland carriers." 46 C.F.R. § 520.1. The Board has acknowledged this. *See Improvement of TOFC/COFC Regulations*, 3 I.C.C.2d 869, 883 (Surface Transp. Bd. 1987). Without benefit of legislation, the Ninth Circuit's decision threatens to interfere with the FMC's jurisdiction over through international transportation by ocean carriers in favor of the STB, which has laid no claim to it and has no experience with it.

Carrier Status Carries Insupportable Burdens—Judicially forcing "rail carrier" status on ocean common carriers would impose substantial new burdens on ocean carriers. As rail carriers under the Interstate Commerce Act, ocean carriers would be subject to financial regulations requiring them to use certain depreciation rights and accounting systems, 49 U.S.C. §§ 11143, 11162, and to file annual reports detailing their expenses, investments, and operating data, *id.* § 11145. They also might be subject to STB regulations on how to calculate their charges, *id.* § 10746, and be required to seek STB approval before terminating any rail carrier operations, *id.* § 10903(a). And, as rail carriers, they also might be subject to other specialized rail statutes such as the Railway Labor Act, 45 U.S.C. § 151 *et seq.*; the Railroad Retirement Act, *id.* § 231 *et seq.*; the Federal Employers Liability Act, *id.* § 51 *et seq.*; and the Federal Rail Safety Act, 49 U.S.C. § 20101 *et seq.*

Treating ocean carriers as rail carriers would raise overlapping and possibly contradictory filing requirements. If the STB had exclusive jurisdiction over ocean carriers when they provide the inland leg of through shipments, through rates in service contracts for such inland transportation apparently would no longer be filed with the FMC, but port-to-port service contract rates still would be filed. The treatment of the ancillary tariff charges and rules applicable to through movements and currently published per FMC Regulations would be a knotty question. Service contracts, which cover both port-to-port and through movements, would be filed with the Commis

sion, but would also come under Board jurisdiction. It would be an impossible situation.

The Interstate Commerce Act cannot be read to wreak such havoc. Statutes must be read to harmonize rather than create conflicts between them. *See, e.g., Sky Reefer*, 515 U.S. at 533 ("[W]hen two statutes are capable of co-existence . . . it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." (quotation marks and citation omitted)). This principle applies with special force where, as here, an interpretation would create a conflict between the jurisdiction of two administrative agencies that have been operating harmoniously (and whose views were not considered or even sought). *See, e.g., Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (noting that statutes should be interpreted to create a "symmetrical and coherent regulatory scheme" (quotation marks and citation omitted)).

Carmack does not apply to "K" Line's through transportation because "K" Line is not a "rail carrier" by Carmack's definition.

B. Carmack Applies Only To Property Received For Domestic Rail Transportation.

The Ninth Circuit wrongly assumed that Carmack's coverage is coextensive with the STB's jurisdiction. Pet. App. 12a. Carmack applies where property is received for domestic rail transportation and not where the property is received for through transportation into the United States.

Carmack requires rail carriers providing transportation subject to the Board's jurisdiction to issue a

receipt or bill of lading for property received "for transportation under this part." 49 U.S.C. § 11706. Carmack appears in Part A of the Interstate Commerce Act, which grants the Board jurisdiction over "transportation by rail carrier," *id.* § 10501(a)(1), but applies "only to transportation in the United States," *id.* § 10501(a)(2). Thus, it is triggered only when property is received for domestic rail transportation.

When cargo is shipped substantially by ocean under a through bill of lading, the contract is maritime in nature. As this Court recognized in *Kirby*: "Conceptually, so long as a bill of lading requires substantial carriage of goods by sea, its purpose is to effectuate maritime commerce . . . ." 543 U.S. at 27.

"K" Line was under no obligation to use rail or any other mode of domestic transportation to move the Shippers' cargoes. "K" Line received the cargo at issue in this question in China for shipment to points in the Midwest, JA 117-18 (¶¶ 6-11), but not by rail. The Service Contracts obligated "K" Line only to carry cargo "from the Origins to the Destinations." JA 188 (¶IV). Ocean carriage to Long Beach was contemplated in the Bills of Lading, JA 138, 149, 161, 173 (see face of bills of lading), but no rail carriage was specified to the Midwest. Quite the contrary, the bills explicitly acknowledged that carriage "may be done by more than one method or route of transport" and that "no method or route of transport nor Vessel nor any other means of transport is agreed to be used." JA 146 (¶6). Thus, "K" Line was free to use motor carriers or barges for any segment of the domestic transportation.

Since "K" Line was not required to use rail transportation by the service contracts or the bills of

lading for the Shippers' cargo and was free to use motor carriers or barges to deliver those cargoes, it did not receive the cargo "for transportation under this [railroad] part," as required by Carmack. 49 U.S.C. § 11706(a).

This conclusion is consistent with the basic mechanism adopted by Carmack. Carmack regulates rail transportation liability through the "efficacious device" of dealing with the terms of bills of lading for rail transportation. GILMORE & BLACK, THE LAW OF ADMIRALTY § 3-25, at 145. The primary purpose of Carmack was "to relieve shippers of the burden of searching out a particular negligent carrier from among the often numerous carriers handling . . . goods." *Reider v. Thompson*, 339 U.S. 113, 119 (1950). Carmack accomplished this goal by requiring receiving carriers to issue a bill of lading for transportation to the final destination, and making them liable for loss or damage caused by a carrier in transit, excepting certain exemptions from this liability. Act of June 29, 1906, Pub. L. No. 59-377, § 7, 34 Stat. 584, 595 (codified at 49 U.S.C. § 11706(a)). Thus, as this Court recognized, the "effect of the Carmack amendment is to hold the initial carrier . . . as having contracted for through carriage to the point of destination." *Atl. Coast Line R.R.*, 219 U.S. at 196.

When ocean common carriers issue through bills of lading, there is no need for Carmack because, as in this case, the ocean carrier is liable from receipt to delivery. By definition, an ocean common carrier "assumes responsibility for the transportation from the port or point of receipt to the port or point of destination." 46 U.S.C. § 40102(6); *see also id.* § 40102(17) (defining ocean common carrier). Thus,

adding Carmack to the mix for inland rail legs would be a gratuitous, confusing complication.

C. Section 7 Of COGSA Governs The Inland Legs Of Through Transportation Under Maritime Contracts Involving Foreign Trade.

While through transportation by ocean carriers under maritime contracts in foreign trade is beyond the scope of Carmack, COGSA explicitly deals with such transportation, and Section 7 of COGSA provides for extension of its terms to the inland leg of a through shipment. Carmack should not be stretched to cover such shipments and thereby create a conflict with COGSA—especially because, as this Court noted in *Kirby*, Section 7 promotes uniformity and facilitates efficient contracting.

1. Section 7 Of COGSA Applies By Its Terms To The Domestic Leg Of Transportation From Foreign Countries When It Is Incorporated In Maritime Contracts.

Section 7 of COGSA permits ocean carriers to enter into agreements with shipper customers concerning their responsibility and liability for domestic transportation following the discharge of goods from a ship:

> Nothing contained in [COGSA] shall prevent a carrier . . . from entering into any agreement . . . as to the responsibility and liability of the carrier . . . for the loss or damage to or in connection with the custody and care and handling of goods . . . subsequent to the discharge from the ship on which the goods are carried by sea.

46 U.S.C. § 30701 Note § 7.

Thus, this language permits ocean carriers to enter into agreements governing their dealings with their shipper customers, including the carriers' liability for domestic transportation provided under a through bill of lading. *See, e.g.*, *Kirby*, 543 U.S. at 29 (applying COGSA to rail transportation provided under through bill of lading). The Shippers and "K" Line did so in this case by agreement in the Through Bills, JA 144 (¶4), and gave all subcontractors involved in the through transportation the benefit of all COGSA terms, JA 145 (¶5(2)). The parties contracted to apply COGSA to all phases of the through transportation, thereby achieving liability uniformity under their Through Bills and certainty in their dealings during the entire carriage.

2. Nothing In Law Or Practice Recommends Substituting Carmack For COGSA.

Extending Carmack by forced interpretation to international transportation under through bills of lading would bring Carmack into needless conflict with Section 7 of COGSA. The Through Bills limit the liability of "K" Line and its subcontractors as well as affording them an array of traditional defenses to cargo liability. If Carmack were applied, these provisions would be nullified in violation of well-settled principles of statutory interpretation.

The liability regime imposed by Carmack is incompatible with COGSA. Under COGSA, a carrier's liability for loss or damage to cargo during transit is based upon negligence. 46 U.S.C. § 30701 Note § 4; *see generally* THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW 88, 104-06 (2d ed. 1994). COGSA is flexible, allowing parties to contractually limit liability, 46 U.S.C. § 30701 Note § 4(5), as well as

select forums for disputes, *see Sky Reefer*, 515 U.S. at 537-39.

Carmack is far more rigid. Carmack makes receiving and delivering carriers liable for loss or damage caused by a rail carrier, 49 U.S.C. § 11706(a), and thus imposes "something close to strict liability." *Rankin*, 336 F.3d at 9. Carmack restricts the ability of parties to agree to limitations on liability, 49 U.S.C. § 11706(c), or to contractual limitations periods, *id.* § 11706(e). In addition, Carmack's venue provision, *id.* § 11706(d), has been interpreted to prohibit forum selection clauses. *See, e.g., Aaacon Auto Transp., Inc. v. State Farm Mut. Auto. Ins. Co.*, 537 F.2d 648, 657 (2d Cir. 1976). The decision below recognized that its view of Carmack creates conflict with Section 7 of COGSA. Pet. App. 24a.

Carmack should not be cast so as to create such a conflict. Where two statutes potentially touch upon a subject, courts should interpret those statutes to create "a symmetrical and coherent regulatory scheme." *Brown & Williamson*, 529 U.S. at 133 (quotation marks and citation omitted). Accordingly, courts should construe statutes to harmonize, not conflict. *See, e.g., Sky Reefer*, 515 U.S. at 533. That is easily done: properly read, Carmack does not impinge upon the domestic portion of international shipments under through bills of lading. *See supra* pp. 32-34.

Other supporting canons of construction can be brought to bear: First, it is a "cardinal principle of statutory construction" that statutes should not be construed to render any part of a statute "superfluous, void, or insignificant." *TRW, Inc. v. Andrews*, 534 U.S. 19, 31 (2001). Extension of Carmack to international through bills of lading transgresses this

rule by preventing the extension of COGSA terms to rail legs of international through transportation in the face of Section 7's authorization of shippers and carriers to agree "as to the responsibility and liability of the carrier or the ship for the loss or damage to . . . goods . . . subsequent to the discharge from the ship on which the goods are carried by sea." 46 U.S.C. § 30701 Note § 7.

Second, a statute pinpointing an issue should govern over one that does not, because Congress presumably paid conscious heed to the issue in passing the statute recognizing it. *See Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976); *Morton v. Mancari*, 417 U.S. 535, 551 (1974). Section 7 of COGSA's attention to the inland leg of intermodal shipments from foreign countries by ocean carriers trumps any tangential concern with the subject that might be read into Carmack.

3. Applying COGSA Section 7 To Domestic Portions Of Transportation Under Through Bills Of Lading Comports With Widespread Practice, Promotes Uniformity, And Avoids Unnecessary Litigation.

As this Court recognized in *Kirby*, COGSA contains efficient default rules and permits uniform rules to govern all phases of international through shipments. *See Kirby*, 543 U.S. at 25. Introducing Carmack into maritime through transportation and thereby replacing COGSA's rules with Carmack's would undermine accepted, stable shipping practices, create confusion and inefficiency, and unnecessarily increase the cost of litigating transportation claims. Carmack would defeat its own objective, by making shippers search out where and when losses occur.

COGSA is Entrenched in International Ocean Shipping—The decision below would undermine the existing liability structure for ocean transportation implemented in shipping practices in all United States ocean trades. Ocean carriers routinely use Section 7 to extend COGSA provisions to inland transportation. *See, e.g.*, *Starrag v. Maersk, Inc.*, 486 F.3d 607, 614 (9th Cir. 2007) ("contractual extension of the COGSA is now routine in the shipping industry"). Through bills of lading applicable "both to sea and land . . . are regularly executed around the world." *Kirby*, 543 U.S. at 28; *see also Robert C. Herd & Co. v. Kravill Mach. Corp.*, 359 U.S. 297, 301 (1959) (noting COGSA codifies an international convention). Extending Carmack would be a blow to orderly, established shipping practices.

Casting COGSA Aside Would be a Blow to Uniformity in International Ocean Shipping—Application of Carmack would eliminate the uniformity permitted by extension of COGSA's terms. In *Kirby*, this Court observed that extension of Section 7 is an "efficient choice" because "[c]onfusion and inefficiency will inevitably result if more than one body of law governs a given contract's meaning." 543 U.S. at 26, 29; *see also Indem. Ins. Co. of N. Am. v. Hanjin Shipping Co.*, 348 F.3d 628, 636 (7th Cir. 2003) (noting that applying one body of law to a shipment makes "eminent good sense, as compared with the inefficient alternative of applying a different substantive law to the container depending on whether it is sitting on board a ship, on a rail car, or on a truck"). Thus, as the decision below acknowledged, Pet. App. 25a, its novel application of Carmack would defeat "the apparent purpose of COGSA, to facilitate efficient contracting in contracts for carriage by sea." *Kirby*, 543 U.S. at 29.

Carmack Would Burden a Staggering Industry with New Layers of Costs—Carmack would increase ocean carriers' and, inevitably, their customers' costs by introducing new elements into through transportation costs and pricing. Carmack permits restrictions on liability for transporting cargo only if they are based upon a declaration concerning the value of a particular shipment. *See* 49 U.S.C. § 11706(c)(3)(A). But the container rates in long-term service contracts employed by ocean carriers such as "K" Line are fixed when the contracts are signed, and can be changed only by filed amendments. They are only loosely based on the value of each commodity, because liability is fixed by the COGSA limits, regardless of the commodity shipped. JA 194-95 (basing rate on size of container shipped).

"K" Line, and every other VOCC subcontracting for rail carriage of ocean containers, would be required by the lower court to offer Carmack terms to every shipper for the inland rail "leg" at the outset, when negotiating any service contract contemplating inland movement under through bills of lading. Ocean carriers would be liable under through bills of lading to shipper customers for any loss or damage caused by railroads exceeding railroad contract limitations, without the protection of the through bill of lading liability limits and defenses. Ocean carriers would thus effectively have to become cargo insurers for inland legs on an industry-wide basis. The result would be confusion and increases in costs for all concerned. The decision below would impact the contracting process like a runaway train.

If Carmack were applied to ocean common carriers providing through transportation, in order for the carriers to assess and insure their liability, they

would have to engage in a new endeavor: investigating the value of each commodity and guessing at volumes to be shipped during one, two or three years. This Court has recognized that such an investigation alone could increase substantially the cost of contracting, *see Kirby*, 543 U.S. at 35. The unavoidable effect of all this would be radically increased costs for the ocean carriers, both for insurance itself and for the administration of this new and complex liability structure.

All these problems, unexplored territory for the lower court, would be created for a seamless transportation system that has been benefiting commerce for decades without the intrusion of warring regulatory regimes. ROLAND ET AL., THE WAY OF THE SHIP 351-52.

Superimposing Carmack's liability rules upon ocean carriers would have dire consequences for the intermodal transportation industry, which is already in desperate straits, only now seeing some hope for recovery after two years of disastrous results (losses of some $20 billion this year alone). THE JOURNAL OF COMMERCE, Dec. 2, 2009, Vol. 10, No. 48, at 10, 11. Carmack makes carriers liable for loss or damage to property on an essentially strict liability basis subject only to a handful of defenses. *See Rankin*, 336 F.3d at 9.

Application of Carmack to ocean carriers effectively would transfer responsibility for insuring cargo to ocean carriers. Ocean carriers are insured by "P&I clubs," which are actually a mechanism for ocean carriers to pool their risks. *See generally* P&I Club *Amicus* Brief. The club structure, based as it is on mutual risk sharing by ocean carriers, is not adaptable to a Carmack liability regime. The clubs in U.S. trades

would be offered as the cargo insurers for the full value of each of a huge universe of commodities, replacing the cargo shipper's insurers. The ocean carriers would be in the business of insuring against the loss or damage to cargoes in the hundreds of millions of containers shipped in through transport each year in U.S. foreign trade. *Id.* The ramifications of imposing potential liability of this magnitude are too serious and complex to assay.

It is clear Carmack would increase insurance costs. Cargo owners are in the position to determine the exact value and volume of their cargoes on an individual basis. Ocean carriers can only guess at the value and volumes of the cargo that will be offered by a shipper over the term of a service contract. The task of underwriting this whole new world of risk could only result in massive waste and inefficiency. *See generally* P&I Group *Amicus* Brief. Thus, as the decision below acknowledged, Pet. App. 25a, application of Carmack would defeat "the apparent purpose of COGSA[] to facilitate efficient contracting in contracts for carriage by sea." *Kirby*, 543 U.S. at 29.

Application of Carmack Would Increase Litigation Costs—Application of Carmack to the domestic portion of international through shipments and the creation of differing legal regimes for different portions of those shipments would needlessly and wastefully complicate claims for loss or damage as well. It would be necessary to determine when, where and how a particular loss occurred in order to determine ocean carrier liability. When ocean common carrier liability is governed by a single, uniform rule, such determinations are unnecessary, and there may be no need to litigate those issues.

Carmack Application Would Undercut Carmack's Own Primary Objective—Indeed, applying Carmack to international through transportation would be counterproductive, for it would undermine Carmack's primary objective of protecting shippers from having to determine which carrier involved in an interstate shipment was responsible for loss or damage to cargo. *See Reider*, 339 U.S. at 502. Under the Ninth Circuit's decision, the shipper would have to determine which carrier in a string of carriers was responsible, for through transportation involves a daisy chain of truckers overseas, the ocean carrier, domestic truckers, the railroad, then more domestic truckers.

Carmack imposes liability for loss or injury "caused by—(1) the receiving *rail* carrier; (2) the delivering *rail* carrier; or (3) another *rail* carrier" transporting the property. 49 U.S.C. § 11706(a) (emphasis added). Of course, an ocean carrier is not a "rail carrier," so the Ninth Circuit decision cannot be read to displace COGSA and require Carmack terms for the ocean leg or the motor carrier legs; thus the only leg where the full value would be triggered would be the domestic rail leg. *See supra* pp. 23-32. How this nightmarish scenario would impact shippers' damage claims processes is anyone's guess, but the one certainty is that it would not simplify it.

II. CARMACK'S HISTORY CONFIRMS IT DOES NOT APPLY TO TRANSPORTATION FROM NON-ADJACENT COUNTRIES.

Any ambiguity concerning the application of the Carmack Amendment to international through shipments from foreign countries is dispelled by the history of the Amendment. Prior to its recodification in

1978, Carmack plainly did not cover shipments involving nonadjacent foreign countries. Although the recodification facially obscured that restriction, Congress unequivocally instructed that the recodification was not to alter Carmack's meaning.

A. Before Recodification In 1978, Carmack Unquestionably Was Inapplicable To Through Transportation From Foreign Countries.

Before the 1978 recodification, it was perfectly clear from both the plain language of the Carmack Amendment and the decisions construing the Amendment that it did not extend to import shipments or export shipments to non-adjacent countries.

1. Before Recodification, Carmack's Terms Limited It To Property Received For Domestic Transportation Or For Transportation "From Any Point In The United States To A Point In An Adjacent Foreign Country."

When Carmack was originally enacted, it applied only to transportation "from a point in one State to a point in another State." Act of June 29, 1906, Pub. L. No. 59-377, § 7, 34 Stat. 584, 595. In 1915, in the Cummins Amendment, Congress expanded the scope of Carmack to include transportation to United States territories and export shipments to adjacent countries. *See* Act of Mar. 4, 1915, Pub. L. No. 63-325, § 1, 38 Stat. 1196, 1197. As a consequence, prior to its recodification, Carmack applied only to property received for transportation "[1] from a point in one State or Territory or the District of Columbia to a point in another State, Territory, [or] District of

Columbia, or [2] *from any point in the United States to a point in an adjacent foreign country*." 49 U.S.C. § 20(11) (1976) (emphasis added). Thus, Carmack plainly did not apply where a carrier received property for transportation *from* rather than to a foreign country or to any transportation involving a *non-adjacent* foreign country such as China.

2. Before Recodification, Courts Unanimously Recognized Carmack's Inapplicability To Through Transportation From Foreign Countries.

Before recodification, courts recognized that Carmack does not apply to shipments under through bills of lading from foreign countries into the United States. *See, e.g.*, *Sklaroff v. Pa. R.R. Co.*, 184 F.2d 575, 575 (3d Cir. 1950); *Strachmen v. Palmer*, 177 F.2d 427, 429-30 (1st Cir. 1949); *Fabiano Shoe Co v. Alitalia Airlines*, 380 F. Supp. 1400, 1402 (D. Mass. 1974); *Condakes v. Smith*, 281 F. Supp. 1014, 1015 (D. Mass. 1968); *Harry Becker & Co. v. Wabash Ry. Co.*, 55 N.W.2d 776, 779 (Mich. 1952); *Leary v. Aero Mayflower Transit Co.*, 207 S.E.2d 781, 789 (N.C. Ct. App. 1974) 335 Mich. 159, 164 (1952); *Alwine v. Pa. R.R. Co.*, 15 A.2d 507, 509 (Pa. 1940).

The Interstate Commerce Commission also recognized that Carmack does not apply to transportation from foreign countries. Indeed, shortly after the Cummins Amendment was enacted expanding Carmack to cover limited international transportation, the Interstate Commerce Commission observed that Carmack does not apply to "export and import shipments to or from foreign countries not adjacent to the United States" because Carmack "makes no reference to shipments . . . from a nonadjacent foreign country." *In re Cummins Amendment*, 33 I.C.C. 682, 693

(1915); *see also Heated Car Serv. Regulations*, 50 I.C.C. 620, 623 (1918) ("[T]he so-called Cummins amendment to the act to regulate commerce does not relate to traffic moving from points in an adjacent foreign country to points in the United States . . . ."). A leading treatise on common carriers similarly recognized that Carmack does not cover carriers "engaged in transporting property in foreign commerce other than to adjacent foreign countries." 1 M.G. ROBERTS, FEDERAL LIABILITIES OF CARRIERS § 360, at 710 (2d ed. 1929).

Thus, before recodification there was no doubt Carmack had no application to shipments under through bills of lading from foreign countries.

3. This Court's Decision In *Woodbury* Did Not Require Application Of Carmack To Through Transportation From Foreign Countries.

In *Galveston, H. & S.A. Ry. Co. v. Woodbury*, 254 U.S. 357 (1920), this Court applied Section 1 of the Interstate Commerce Act, ch. 104, 24 Stat. 379 (1887) (currently codified at 49 U.S.C. § 10501), to the domestic leg of a roundtrip railroad trip from Canada to Texas. Because at that time Section 1 contained language similar to Carmack, the Second Circuit reasoned that Carmack's pre-codification language must have covered shipments from foreign countries. *See Sompo Japan Ins. Co. of Am. v. Union Pac. R.R. Co.*, 456 F.3d 54, 65-69 (2d Cir. 2006). But *Woodbury*'s construction of Section 1 was not based upon the language shared with Carmack, and the test it adopted for applying Section 1 is incompatible with Carmack.

In construing Section 1 of the Interstate Commerce Act in *Woodbury*, this Court focused upon the nature of a carrier's operations. At the time applicable to the case, Section 1 covered common carriers "engaged in the transportation of passengers or property . . . from any place in the United States to an adjacent foreign country." *Woodbury*, 254 U.S. at 359 (quoting 49 U.S.C. § 20(11) (1917)). Focusing on the nature of the operations in which carriers engage, this Court held that "[t]he test of the application of the Act is not the *direction* of the movement, but the *nature* of the transportation as determined by the field of the carrier's operation." *Id.* at 359-60 (emphasis added). Because carriers engaged in transportation from a foreign country normally engage in transportation to that country as well, this Court held that Section 1 applied to a rail carrier that transported a passenger on the inbound leg of a round trip journey from Canada to Texas and therefore enforced a provision limiting liability in the tariff. *Id.* In so doing, the Court did not parse the text of Section 1 or in any way suggest that the test adopted by the Court was based upon the language shared with Carmack.

Whatever the merits of the test *Woodbury* adopted for applying Section 1, that test should not be applied to Carmack. Carmack does not regulate the general operations of carriers; it imposes liability for shipment of property. *See* 49 U.S.C. § 11706(a). In addition, the direction of shipment was significant under Carmack because Carmack required rail carriers to issue bills of lading for transportation "from a point" in one State or Territory "to a point" in another State or Territory, or "from any point" in the United States "to a point" in an adjacent foreign country. *Id.* Accordingly, when this Court applied Carmack in *Reider v. Thompson*, 339 U.S. 113 (1950),

it did not employ the *Woodbury* test. Instead, this Court held that under Carmack "[t]he test is . . . where the obligation of the carrier as receiving carrier originated." *Id.* at 117.

The coverages of Carmack and the ICA are not coextensive. Congress has made clear that Section 1 of the Interstate Commerce Act is broader than Carmack. The lower court decision in *Woodbury* held that neither Carmack nor Section 1 of the Interstate Commerce Act applied to the transportation in that case from Canada to Texas. *See Woodbury v. Galveston, H. & S.A. Ry. Co.*, 209 S.W. 432, 435 (Tex. Civ. App. 1919). The following year, in the Transportation Act of 1920, Congress amended Section 1 to say that the Act applies to transportation "from or to any place in the United States to or from a foreign country," 41 Stat. 456, 474 (1920). Congress, however, did not amend the portion of Carmack limiting its application to property received for transportation "from any point in the United States to a point in an adjacent foreign country." 49 U.S.C. § 20(11) (1976). Thus, Congress clearly intended for Section 1 to be broader than Carmack.[4]

Woodbury offers no basis for ignoring the language of Carmack prior to codification, which plainly excluded shipments from non-adjacent foreign countries such as China.

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[4] In *Sompo* the Second Circuit misunderstood the significance of the Transportation Act of 1920 because it mistakenly believed that the statute was "enacted two months after the Supreme Court issued its decision in *Woodbury*." *See* 456 F.3d at 66. In fact, the Transportation Act was enacted on February 28, 1920, 41 Stat. 456, eleven months before the Supreme Court's decision in *Woodbury* was issued on December 13, 1920, *see Woodbury*, 254 U.S. 357.

B. The 1978 Recodification Did Not Expand Carmack Because Congress Expressly Eschewed Substantive Changes By The Recodification.

In 1978, Congress recodified the Interstate Commerce Act and related laws. Act of Oct 17, 1978, Pub. L. No. 95-473, 92 Stat. 1337. When a statute is codified or recodified, this Court does not presume that the changes in the statute "worked a change in the underlying substantive law unless an intent to make such a change is clearly expressed." *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 136 (2008) (quoting *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 227 (1957)) (quotation marks and citation omitted). Congress expressly stated that this recodification "restate[s], without substantive change, laws" revised in the recodification. Act of Oct 17, 1978, Pub. L. No. 95-473, § 3(a), 92 Stat. 1337, 1466. Lest there be any mistake, Congress added, the revised provisions "may not be construed as making a substantive change." *Id.* Thus, Congress could not have been clearer that the 1978 recodification made no substantive change in the law.

While Congress revised the language from the Cummins Amendment limiting Carmack to domestic shipments and export shipments to adjacent countries, there is no reason to believe that Congress intended to expand the scope of Carmack in doing so. Prior to recodification, Carmack required carriers covered by it to issue bills of lading when they received property "for transportation from a point in one State or Territory to a point in another State, Territory, District of Columbia, or from any point in the United States to a point in an adjacent foreign country." 49 U.S.C. § 20(11) (1976). In the recodi-

fication, Congress sought to streamline this language by requiring covered carriers to issue bills of lading for property received "for transportation under this subtitle," Act of Oct. 17, 1978, Pub. L. No. 94-473, 92 Stat. 1453, and this language in turn was revised into the current reference to property received "for transportation under this part," 49 U.S.C. § 11706(a). Moreover, while the Cummins language does not directly limit Carmack to domestic shipments and export shipments to adjacent foreign countries, it does so indirectly.

C. When Congress Reenacted Carmack In 1995, It Implicitly Adopted Prior Judicial Decisions Holding Carmack Inapplicable To Through Transportation From Foreign Countries.

In 1995, as part of the ICC Termination Act, Congress revised the rail part of the Transportation Code and in the process reenacted Carmack. *See* Pub. L. No. 104-88, § 102(a), 109 Stat. 803, 847-49. When Congress reenacts a statute, it is assumed to be aware of, and to adopt, prior case law construing the statute. *See, e.g., Keene Corp. v. U.S.*, 508 U.S. 200, 212 (1993); *Lorillard v. Pons*, 434 U.S. 575, 580 (1978).

The courts interpreting Carmack between the 1978 recodification and the 1995 reenactment adhered to the prior understanding that Carmack does not apply to through shipments from foreign countries. *See Shao v. Link Cargo (Taiwan) Ltd.*, 986 F.2d 700, 703-04 (4th Cir. 1993); *Capitol Converting Equip., Inc. v. LEP Transp., Inc.*, 965 F.2d 391, 394-95 (7th Cir. 1992); *Swift Textiles, Inc. v. Watkins Motor Lines, Inc.*, 799 F.2d 697, 701 (11th Cir. 1986), *cert. denied*, 480 U.S. 935 (1987); *see also Kenny's Auto Parts, Inc.*

v. Baker, 478 F. Supp. 461, 464 (E.D. Pa. 1979) ("The cases interpreting the Carmack Amendment have uniformly held that the Carmack Amendment has no application to goods received for shipment at a point outside the United States."). The reenactment of Carmack provides one final confirmation that the Amendment cannot be applied to the through transportation that "K" Line provided from China.

CONCLUSION

For these reasons, the decision of the court of appeals should be reversed.

Respectfully submitted,

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ADDENDUM

46 U.S.C.A. § 40501 (2009)

§ 40501. General rate and tariff requirements

(a) **Automated tariff system.**

(1) In general. Each common carrier and conference shall keep open to public inspection in an automated tariff system, tariffs showing all its rates, charges, classifications, rules, and practices between all points or ports on its own route and on any through transportation route that has been established. However, a common carrier is not required to state separately or otherwise reveal in tariffs the inland divisions of a through rate.

(2) **Exceptions.** Paragraph (1) does not apply with respect to bulk cargo, forest products, recycled metal scrap, new assembled motor vehicles, waste paper, or paper waste.

(b) **Contents of tariffs.** A tariff under subsection (a) shall—

(1) state the places between which cargo will be carried;

(2) list each classification of cargo in use;

(3) state the level of compensation, if any, of any ocean freight forwarder by a carrier or conference;

(4) state separately each terminal or other charge, privilege, or facility under the control of the carrier or conference and any rules that in any way change, affect, or determine any part or the total of the rates or charges;

(5) include sample copies of any bill of lading, contract of affreightment, or other document evidencing the transportation agreement; and

(6) include copies of any loyalty contract, omitting the shipper's name.

(c) **Electronic access.** A tariff under subsection (a) shall be made available electronically to any person, without time, quantity, or other limitation, through appropriate access from remote locations. A reasonable fee may be charged for such access, except that no fee may be charged for access by a Federal agency.

(d) **Time-volume rates.** A rate contained in a tariff under subsection (a) may vary with the volume of cargo offered over a specified period of time.

(e) **Effective dates.**

(1) **Increases.** A new or initial rate or change in an existing rate that results in an increased cost to a shipper may not become effective earlier than 30 days after publication. However, for good cause, the Federal Maritime Commission may allow the rate to become effective sooner.

(2) **Decreases.** A change in an existing rate that results in a decreased cost to a shipper may become effective on publication.

(f) **Marine terminal operator schedules.** A marine terminal operator may make available to the public a schedule of rates, regulations, and practices, including limitations of liability for cargo loss or damage, pertaining to receiving, delivering, handling, or storing property at its marine terminal. Any such schedule made available to the public is enforceable

by an appropriate court as an implied contract without proof of actual knowledge of its provisions.

(g) **Regulations.**

(1) **In general.** The Commission shall by regulation prescribe the requirements for the accessibility and accuracy of automated tariff systems established under this section. The Commission, after periodic review, may prohibit the use of any automated tariff system that fails to meet the requirements established under this section.

(2) **Remote terminals.** The Commission may not require a common carrier to provide a remote terminal for electronic access under subsection (c).

(3) Marine terminal operator schedules. The Commission shall by regulation prescribe the form and manner in which marine terminal operator schedules authorized by this section shall be published.

46 U.S.C.A. § 40502 (2009)

§ 40502. Service contracts

(a) **In general.** An individual ocean common carrier or an agreement between or among ocean common carriers may enter into a service contract with one or more shippers subject to the requirements of this part.

(b) **Filing requirements.**

(1) **In general.** Each service contract entered into under this section by an individual ocean common carrier or an agreement shall be filed confidentially with the Federal Maritime Commission.

(2) **Exceptions.** Paragraph (1) does not apply to contracts regarding bulk cargo, forest products, recycled metal scrap, new assembled motor vehicles, waste paper, or paper waste.

(c) **Essential terms.** Each service contract shall include—

(1) the origin and destination port ranges;

(2) the origin and destination geographic areas in the case of through intermodal movements;

(3) the commodities involved;

(4) the minimum volume or portion;

(5) the line-haul rate;

(6) the duration;

(7) service commitments; and

(8) the liquidated damages for nonperformance, if any.

(d) **Publication of certain terms.** When a service contract is filed confidentially with the Com-

mission, a concise statement of the essential terms specified in paragraphs (1), (3), (4), and (6) of subsection (c) shall be published and made available to the general public in tariff format.

(e) **Disclosure of certain terms.**

(1) **Definitions.** In this subsection, the terms "dock area" and "within the port area" have the same meaning and scope as in the applicable collective bargaining agreement between the requesting labor organization and the carrier.

(2) **Disclosure.** An ocean common carrier that is a party to or is otherwise subject to a collective bargaining agreement with a labor organization shall, in response to a written request by the labor organization, state whether it is responsible for the following work at a dock area or within a port area in the United States with respect to cargo transportation under a service contract:

(A) The movement of the shipper's cargo on a dock area or within the port area or to or from railroad cars on a dock area or within the port area.

(B) The assignment of intraport carriage of the shipper's cargo between areas on a dock or within the port area.

(C) The assignment of the carriage of the shipper's cargo between a container yard on a dock area or within the port area and a rail yard adjacent to the container yard.

(D) The assignment of container freight station work and container maintenance and repair work performed at a dock area or within the port area.

(3) **Within reasonable time.** The common carrier shall provide the information described in paragraph (2) to the requesting labor organization within a reasonable period of time.

(4) **Existence of collective bargaining agreement.** This subsection does not require the disclosure of information by an ocean common carrier unless there exists an applicable and otherwise lawful collective bargaining agreement pertaining to that carrier. A disclosure by an ocean common carrier may not be deemed an admission or an agreement that any work is covered by a collective bargaining agreement. A dispute about whether any work is covered by a collective bargaining agreement and the responsibility of an ocean common carrier under a collective bargaining agreement shall be resolved solely in accordance with the dispute resolution procedures contained in the collective bargaining agreement and the National Labor Relations Act (29 U.S.C. 151 *et seq.*), and without reference to this subsection.

(5) **Effect under other laws.** This subsection does not affect the lawfulness or unlawfulness under this part or any other Federal or State law of any collective bargaining agreement or element thereof, including any element that constitutes an essential term of a service contract.

(f) **Remedy for breach.** Unless the parties agree otherwise, the exclusive remedy for a breach of a service contract is an action in an appropriate court. The contract dispute resolution forum may not be controlled by or in any way affiliated with a controlled carrier or by the government that owns or controls the carrier.

46 U.S.C.A. § 40102 (2009)

§ 40102. Definitions

In this part:

(6) **Common carrier.** The term "common carrier"—

(A) means a person that—

(i) holds itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation;

(ii) assumes responsibility for the transportation from the port or point of receipt to the port or point of destination; and

(iii) uses, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country; but

(17) **Ocean common carrier.** The term "ocean common carrier" means a vessel-operating common carrier.

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46 U.S.C.A. § 41102 (2009)

§ 41102. General prohibitions

(a) **Obtaining transportation at less than applicable rates.** A person may not knowingly and willfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, false measurement, or any other unjust or unfair device or means, obtain or attempt to obtain ocean transportation for property at less than the rates or charges that would otherwise apply.

(b) **Operating contrary to agreement.** A person may not operate under an agreement required to be filed under section 40302 or 40305 of this title if—

(1) the agreement has not become effective under section 40304 of this title or has been rejected, disapproved, or canceled; or

(2) the operation is not in accordance with the terms of the agreement or any modifications to the agreement made by the Federal Maritime Commission.

(c) **Practices in handling property.** A common carrier, marine terminal operator, or ocean transportation intermediary may not fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property.

46 U.S.C.A. § 41103 (2009)

§ 41103. Disclosure of information

(a) **Prohibition.** A common carrier, marine terminal operator, or ocean freight forwarder, either alone or in conjunction with any other person, directly or indirectly, may not knowingly disclose, offer, solicit, or receive any information concerning the nature, kind, quantity, destination, consignee, or routing of any property tendered or delivered to a common carrier, without the consent of the shipper or consignee, if the information—

(1) may be used to the detriment or prejudice of the shipper, the consignee, or any common carrier; or

(2) may improperly disclose its business transaction to a competitor.

(b) **Exceptions.** Subsection (a) does not prevent providing the information—

(1) in response to legal process;

(2) to the Federal Maritime Commission or an agency of the United States Government; or

(3) to an independent neutral body operating within the scope of its authority to fulfill the policing obligations of the parties to an agreement effective under this part.

(c) **Disclosure for determining breach or compiling statistics.** An ocean common carrier that is a party to a conference agreement approved under this part, a receiver, trustee, lessee, agent, or employee of the carrier, or any other person authorized by the carrier to receive information—

(1) may give information to the conference or any person or agency designated by the conference, for the purpose of—

(A) determining whether a shipper or consignee has breached an agreement with the conference or its member lines;

(B) determining whether a member of the conference has breached the conference agreement; or

(C) compiling statistics of cargo movement; and

(2) may not prevent the conference or its designee from soliciting or receiving information for any of those purposes.

46 U.S.C.A. § 41104 (2009)

§ 41104. Common carriers

A common carrier, either alone or in conjunction with any other person, directly or indirectly, may not—

(1) allow a person to obtain transportation for property at less than the rates or charges established by the carrier in its tariff or service contract by means of false billing, false classification, false weighing, false measurement, or any other unjust or unfair device or means;

(2) provide service in the liner trade that is—

(A) not in accordance with the rates, charges, classifications, rules, and practices contained in a tariff published or a service contract entered into under chapter 405 of this title, unless excepted or exempted under section 40103 or 40501(a)(2) of this title; or

(B) under a tariff or service contract that has been suspended or prohibited by the Federal Maritime Commission under chapter 407 or 423 of this title;

(3) retaliate against a shipper by refusing, or threatening to refuse, cargo space accommodations when available, or resort to other unfair or unjustly discriminatory methods because the shipper has patronized another carrier, or has filed a complaint, or for an other reason;

(4) for service pursuant to a tariff, engage in any unfair or unjustly discriminatory practice in the matter of—

(A) rates or charges;

(B) cargo classifications;

(C) cargo space accommodations or other facilities, with due regard being given to the proper loading of the vessel and the available tonnage;

(D) loading and landing of freight; or

(E) adjustment and settlement of claims;

(5) for service pursuant to a service contract, engage in any unfair or unjustly discriminatory practice in the matter of rates or charges with respect to any port;

(6) use a vessel in a particular trade for the purpose of excluding, preventing, or reducing competition by driving another ocean common carrier out of that trade;

(7) offer or pay any deferred rebates;

(8) for service pursuant to a tariff, give any undue or unreasonable preference or advantage or impose any undue or unreasonable prejudice or disadvantage;

(9) for service pursuant to a service contract, give any undue or unreasonable preference or advantage or impose any undue or unreasonable prejudice or disadvantage with respect to any port;

(10) unreasonably refuse to deal or negotiate;

(11) knowingly and willfully accept cargo from or transport cargo for the account of an ocean transportation intermediary that does not have a tariff as required by section 40501 of this title and a bond, insurance, or other surety as required by section 40902 of this title;

(12) knowingly and willfully enter into a service contract with an ocean transportation intermediary that does not have a tariff as required by section 40501 of this title and a bond, insurance, or other

surety as required by section 40902 of this title, or with an affiliate of such an ocean transportation intermediary.

46 U.S.C.A. § 41105 (2009)

§ 41105. Concerted action

A conference or group of two or more common carriers may not—

(1) boycott or take any other concerted action resulting in an unreasonable refusal to deal;

(2) engage in conduct that unreasonably restricts the use of intermodal services or technological innovations;

(3) engage in any predatory practice designed to eliminate the participation, or deny the entry, in a particular trade of a common carrier not a member of the conference, a group of common carriers, an ocean tramp, or a bulk carrier;

(4) negotiate with a non-ocean carrier or group of non-ocean carriers (such as truck, rail, or air operators) on any matter relating to rates or services provided to ocean common carriers within the United States by those non-ocean carriers, unless the negotiations and any resulting agreements are not in violation of the antitrust laws and are consistent with the purposes of this part, except that this paragraph does not prohibit the setting and publishing of a joint through rate by a conference, joint venture, or association of ocean common carriers;

(5) deny in the export foreign commerce of the United States compensation to an ocean freight forwarder or limit that compensation to less than a reasonable amount;

(6) allocate shippers among specific carriers that are parties to the agreement or prohibit a carrier that is a party to the agreement from soliciting cargo from a particular shipper, except as—

(A) authorized by section 40303(d) of this title;

(B) required by the law of the United States or the importing or exporting country; or

(C) agreed to by a shipper in a service contract;

(7) for service pursuant to a service contract, engage in any unjustly discriminatory practice in the matter of rates or charges with respect to any locality, port, or person due to the person's status as a shippers' association or ocean transportation intermediary; or

(8) for service pursuant to a service contract, give any undue or unreasonable preference or advantage or impose any undue or unreasonable prejudice or disadvantage with respect to any locality, port, or person due to the person's status as a shippers' association or ocean transportation intermediary.

46 U.S.C.A. § 41106 (2009)

§ 41106. Marine terminal operators

A marine terminal operator may not—

(1) agree with another marine terminal operator or with a common carrier to boycott, or unreasonably discriminate in the provision of terminal services to, a common carrier or ocean tramp;

(2) give any undue or unreasonable preference or advantage or impose any undue or unreasonable prejudice or disadvantage with respect to any person; or

(3) unreasonably refuse to deal or negotiate.

PETITIONER'S BRIEF

148 (7) (7)

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DEC 2 ... 2009

Nos. 08-1553 & 08-1554 (Consolidated)

In the Supreme Court of the United States

KAWASAKI KISEN KAISHA LTD., *et al.*,
Petitioners,
v.
REGAL-BELOIT CORPORATION, *et al.*,
Respondents.

UNION PACIFIC RAILROAD COMPANY,
Petitioner,
v.
REGAL-BELOIT CORPORATION, *et al.*,
Respondents.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF PETITIONER UNION PACIFIC RAILROAD CO.

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QUESTION PRESENTED

The Carriage of Goods by Sea Act, 46 U.S.C. §30701 (Notes) ("COGSA"), governs the rights and liabilities of parties to an international maritime bill of lading. COGSA allows parties to extend the terms of such maritime contracts to the entire carriage—including any inland leg of the journey and any downstream carrier. *See Norfolk S. Ry. Co. v. James N. Kirby, Pty Ltd.*, 543 U.S. 14 (2004). The Carmack Amendment to the Interstate Commerce Act ("ICA"), now codified at 49 U.S.C. §11706 (rail carriers) and 49 U.S.C. §14706 (motor carriers), supplies the default liability regime for most rail and motor carrier transportation within the United States. Other provisions of the ICA authorize carriers to contract out of Carmack's default rules. *See* 49 U.S.C. §10709. The question presented is:

Whether the Ninth Circuit must be reversed because it erroneously held, in conflict with four other circuits, that the Carmack Amendment applies to the inland leg of an international, multimodal shipment under a "through" bill of lading, and also erred by holding that carriers providing exempt transportation cannot contract out of Carmack under 49 U.S.C. §10709 or by offering Carmack-compliant terms to the rail carrier's own direct customer?

LIST OF PARTIES

1. Petitioner Union Pacific Railroad Company was a defendant in the district court and an appellee in the court of appeals.

2. Petitioners Kawasaki Kisen Kaisha Ltd. and "K" Line America, Inc. were defendants in the district court and appellees in the court of appeals.

3. Respondents Regal-Beloit Corporation, Victory Fireworks, Inc., PICC Property & Casualty Co. Ltd. (Shanghai Branch), and Royal Sun Alliance Insurance Co. Ltd. were plaintiffs in the district court and appellants in the court of appeals.

RULE 29.6 STATEMENT

Union Pacific Railroad Company has no amendments to its Rule 29.6 Statement included in its petition for certiorari.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (Pet.App.1a-35a) is reported at 557 F.3d 985. The opinion of the United States District Court for the Central District of California (Pet.App.36a-47a) is reported at 462 F. Supp. 2d 1098.

JURISDICTION

The Ninth Circuit entered its opinion and judgment on February 4, 2009, and no party sought rehearing. On April 20, Justice Kennedy extended the time for filing any petition to and including June 18, 2009. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The text of the Carmack Amendment, 49 U.S.C. §§11706 and 14706, other relevant provisions of the Interstate Commerce Act (codified at Title 49), and the Carriage of Goods by Sea Act, 46 U.S.C. §30701 (Notes), are reproduced at Pet.App.48a-115a.

STATEMENT OF THE CASE

Most foreign trade is transported in cargo containers that are carried both by sea on ships and by land on trains or trucks. Such "multimodal" or "intermodal" shipments now account for more than $1 trillion each year in U.S. trade. The modern industry practice is for shippers to arrange on a "through" contract basis for "'door-to-door transport'" across oceans and to inland destinations making "'efficient use of all available modes of transportation by air, water, and land.'" *Norfolk S. Ry. Co. v. James N. Kirby, Pty Ltd.*, 543 U.S. 14, 25 (2004) (quoting 1 Thomas J. Schoenbaum, *Admiralty & Maritime Law* 589 (4th ed. 2004) ("Schoenbaum")). This Court held five years ago in *Kirby* that such through bills of lading are federal

maritime contracts, and that the downstream railroad was entitled to rely upon and enforce the liability limitations contained in the ocean carrier's bill of lading.

Just like *Kirby*, this is another "maritime case about a train wreck." 543 U.S. at 18. The cargo owners (the "shippers") arranged with an ocean carrier, "K" Line, for transportation of goods from China to various inland destinations in the United States. Consistent with the Carriage of Goods by Sea Act ("COGSA"), ch. 229, 49 Stat. 1207 (1936) (46 U.S.C. §30701 (Notes)), the bill of lading to which the shippers agreed limited the liability of "K" Line and any downstream carrier to $500 per package, authorized "K" Line to subcontract for inland transport "on any terms whatsoever," and provided that all disputes must be litigated in Tokyo. "K" Line contracted for rail service with petitioner Union Pacific, and the cargo allegedly was damaged when the train derailed in Oklahoma.

As in *Kirby*, the issue here is whether the carriers may enforce the terms of the maritime contracts to which the shippers agreed. The shippers argue, and the Ninth Circuit held, that the Carmack Amendment to the Interstate Commerce Act ("ICA"), now codified at 49 U.S.C. §11706 (rail carriers) and 49 U.S.C. §14706 (motor carriers), makes the forum selection clause they agreed to unenforceable. This Court did not discuss Carmack or the ICA in *Kirby*, although in all relevant respects the factual posture there was indistinguishable from this case. The Ninth Circuit held, in other words, that this Court either overlooked or ignored an elephant in the room.

The Ninth Circuit is wrong. The Carmack Amendment did not apply in *Kirby*, and it does not

apply here, for several reasons. First, prior to a 1978 recodification the plain language of Carmack applied only to purely domestic interstate transportation and to transportation "from any point in the United States to a point in an adjacent foreign country," *i.e.*, exports to Canada and Mexico. 49 U.S.C. §20(11) (1976). The Ninth Circuit reads the present statutory language differently, but the 1978 codification bill expressly commands that it "may not be construed as making a substantive change in the laws replaced." *See* Act of Oct. 17, 1978, Pub. L. No. 95-473, §3, 92 Stat. 1337, 1466. For more than 50 years prior to that recodification, the lower courts and the Interstate Commerce Commission ("ICC") consistently recognized that Carmack *did not* apply to the inland leg of import transactions like this one.

Even if Carmack would otherwise have applied here, Congress in a 1980 deregulatory bill gave shippers and rail carriers the right to opt out of the ICA (including Carmack) altogether by contracting for rail service on specified terms under 49 U.S.C. §10709. Just like the shipment in *Kirby*, the rail transport here moved as contract carriage under §10709, and the terms of that contract "may not be subsequently challenged ... in any court on the grounds that such contract violates a provision of" the ICA. 49 U.S.C. §10709(c)(1).

The Ninth Circuit held that because the Surface Transportation Board has itself deregulated intermodal transportation under 49 U.S.C. §10502, UP cannot rely on the terms of its §10709 contracts unless it can show that the shippers in China were first presented with, and rejected, Carmack-compliant alternative terms for rail transportation under 49 U.S.C. §10502(e). Section

10709 is not so constrained. Regardless, UP satisfied any obligation it might have under §10502(e) by making Carmack-compliant terms available to its actual shipping counterparty in the United States—here, "K" Line. The Ninth Circuit's holding that UP somehow must seek out "K" Line's own customers in China, in order to make sure they are aware of an alternative they plainly do not care about, is not required by the statutory text and is inefficient, unworkable, and flatly inconsistent with this Court's decision in *Kirby*.

Statutory Background

1. a. In 1887, Congress enacted the ICA and created the ICC to regulate railroad transportation. Act of Feb. 4, 1887, ch. 104, 24 Stat. 379. The ICC's jurisdiction extended to every rail carrier engaged in transportation of property or passengers between two States, to, from, and within territories, "from any place in the United States to an adjacent foreign country," and "from any place in the United States through a foreign country to any other place in the United States," as well as to shipments of property "from any place in the United States to a foreign country and carried from such place to a port of transshipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country." *Id.*

In 1906 Congress added the Carmack Amendment, which applied *only* to "transportation from a point in one State to a point in another State," and established a liability regime under which the first carrier (the one "receiving property for transportation" directly from the shipper) was liable for any damage occurring in the whole shipment, including on the lines of other

connecting or delivering carriers, with a right of recoupment from the carrier on whose line the damage actually occurred. Act of June 29, 1906, ch. 3591, §7, 34 Stat. 584, 595. (Subsequent amendments have imposed similar liability on the "delivering," or final carrier. *See* 49 U.S.C. §11706(a)). Courts have characterized Carmack as imposing on carriers "'something close to strict liability.'" *Sompo Japan Ins. Co. of Am. v. Union Pac. R.R. Co.*, 456 F.3d 54, 59 (2d Cir. 2006) (citation omitted). It essentially codified the common law rule that a carrier is liable for damage caused by the railroad and its employees, even without negligence, but not for acts of God or of a public enemy. *See Adams Express Co. v. Croninger*, 226 U.S. 491, 506-10 (1913). The current version of Carmack preserves the parallel common law rule that the railroad's liability may be limited "to a value established by written declaration of the shipper or by a written agreement between the shipper and the carrier." 49 U.S.C. §11706(c)(3)(A); *see also id.* §14706(c)(1)(A) (motor carriers). It also limits the venues in which a claim may be brought. *See* 49 U.S.C. §11706(d)(2).

In the 1915 Cummins Amendment, Congress extended the scope of Carmack to include "transportation ... from any point in the United States to a point in an adjacent foreign country." Act of Mar. 4, 1915, ch. 176, 38 Stat. 1196, 1197. That remained the statutory language from 1915 until 1978. *See* 49 U.S.C. §20(11) (1976).

In 1978, Congress passed a bill prepared by the Office of Law Revision Counsel in order to recodify the entire ICA and enact it into positive law. That bill expressly provided (in statutory text, not legislative

history) that the recodification was "without substantive changes," and "may not be construed as making a substantive change in the laws replaced." *See* Pub. L. No. 95-473, §3(a), 92 Stat. at 1466; *see also* H.R. Rep. No. 95-1395, at 9 (1978), *reprinted in* 1978 U.S.C.C.A.N. 3009, 3018 (Congress intended to "make[] no substantive change in the law"). In an apparent attempt to streamline the phrasing, the codifiers replaced the longstanding and precise description of Carmack's scope with a reference to "transportation under this subtitle." 92 Stat. at 1453. Carmack was again reenacted in 1995 without any change to the relevant language, except that it now refers to "transportation under this part." Interstate Commerce Commission Termination Act of 1995 ("ICCTA"), Pub. L. No. 104-88, 109 Stat. 803 (codified at 49 U.S.C. §11706(a)).

After similar amendments to simplify the language and to replace the ICC with the new Surface Transportation Board ("STB" or "Board"), the ICA's jurisdictional provision now extends to rail carriers engaged in transportation within the United States that is "between a place in ... the United States and a place in a foreign country." 49 U.S.C. §10501(a).

b. From 1976 to 1980 Congress undertook an expansive deregulation of the rail industry. The Railroad Revitalization and Regulatory Reform Act of 1976 created a mechanism through which the STB may "exempt" a carrier, class of carriers, or a particular service from some or all of the ICA's regulatory requirements. Pub. L. No. 94-210, 90 Stat. 31 (1976) (codified as amended at 49 U.S.C. §10502(a)).

Four years later, Congress passed the Staggers Rail Act. Pub. L. No. 96-448, §2, 94 Stat. 1895, 1896-97

(1980) ("Staggers") (finding that "regulations affecting railroads have become unnecessary and inefficient" and "greater reliance on the marketplace is essential"). Among other things, Congress added to the exemption provision a subsection explicitly authorizing the STB "to exempt transportation that is provided by a rail carrier as a part of a continuous intermodal movement." Staggers, §213, 94 Stat. at 1913 (codified at 49 U.S.C. §10502(f)). The Board has exercised that authority. *See* 49 C.F.R. §§1090.1(a)(4), 1090.2. The Board "may specify the period of time during which an exemption granted under this section is effective," 49 U.S.C. §10502(c), and retains the power to "revoke an exemption," *id.* §10502(d). Such "exempt" carriage thus remains subject to the Board's jurisdiction. *See* Improvement of TOFC/COFC Regulation, 46 Fed. Reg. 14,348, 14,351 (Feb. 27, 1981) ("Nothing in this exemption shall be construed to affect our jurisdiction ....").

Congress also added a provision explaining that an exemption by the STB under §10502(a) does not itself "relieve any rail carrier from an obligation to provide contractual terms for liability and claims which are consistent with the provisions of [the Carmack Amendment]," but also that "[n]othing in this subsection or [Carmack] shall prevent rail carriers from offering alternative terms nor give the [Board] the authority to require any specific level of rates or services based upon the provisions of [Carmack]." Staggers, §213(e), 94 Stat. at 1913 (codified at 49 U.S.C. §10502(e)).

Staggers also added §10713 (Staggers §208, 94 Stat. at 1908, now codified as amended at 49 U.S.C. §10709), which permits the parties to contract for their own

deregulation of particular transportation. It applies to *all* carriage "subject to the jurisdiction of the Board" and states:

> (a) One or more rail carriers providing transportation subject to the jurisdiction of the Board under this part may enter into a contract with one or more purchasers of rail services to provide specified services under specified rates and conditions.
>
> (b) A party to a contract entered into under this section shall have no duty in connection with services provided under such contract other than those duties specified by the terms of the contract.
>
> (c) (1) A contract that is authorized by this section, and transportation under such contract, shall not be subject to this part, and may not be subsequently challenged before the Board or in any court on the grounds that such contract violates a provision of this part.
>
> (2) The exclusive remedy for any alleged breach of a contract entered into under this section shall be an action in an appropriate State court or United States district court, *unless the parties otherwise agree.*

49 U.S.C. §10709 (emphasis added). The service provided under such contracts is therefore "exempt ... from all regulation and all of the requirements of the Interstate Commerce Act," H.R. Rep. No. 96-1035, at 100 (1980), *reprinted in* 1980 U.S.C.C.A.N. 3978, 4132,

including Carmack's venue rules and any requirements imposed by §10502(e).

2. a. COGSA "is the culmination of a multilateral effort 'to establish uniform ocean bills of lading to govern the rights and liabilities of carriers and shippers *inter se* in international trade.'" *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 537 (1995) (citation omitted).

A bill of lading is a contract recording that a carrier has received certain goods from a shipper and establishing other conditions that "govern[] the relationship of the parties before delivery of the goods." 1 Schoenbaum, *supra*, at 621. Historically, ocean bills of lading were not uniformly enforceable in all nations. *See* Grant Gilmore & Charles L. Black, Jr., *The Law of Admiralty* 142-43 (2d ed. 1975). That "distressing lack of uniformity in shipping practice and law" prompted efforts to establish "uniform international regulation of the rights and duties of carriers of ocean cargo." 1 Schoenbaum, *supra*, at 636.

The Hague Rules of 1921 established uniform international law governing the carriage of goods by sea. In 1936, Congress implemented those rules (as amended by international convention in 1924) by enacting COGSA. *Sky Reefer*, 515 U.S. at 536-37.

b. COGSA governs "[e]very bill of lading ... for the carriage of goods by sea to or from ports of the United States, in foreign trade." 46 U.S.C. §30701 (Notes). It guarantees shippers' rights against carriers and establishes the carriers' minimum liability to shippers for cargo damage or loss. (Notes Secs. 2-4).

By its terms, COGSA applies to "the period from the time when the goods are loaded on to the time when they are discharged from the ship," the so-called

"tackle-to-tackle" period. (Notes Sec. 1(e)). But the statute also permits the carrier and shipper to agree to COGSA terms for "the entire period in which the [cargo] would be under [the shipper's] responsibility, including the period of the inland transport." *Kirby*, 543 U.S. at 29 (citing (Notes Sec. 7)). "[C]ontractual extension of COGSA is now routine in the shipping industry." *Starrag v. Maersk, Inc.*, 486 F.3d 607, 614 (9th Cir. 2007). A so-called "clause paramount" in a bill of lading extends COGSA's liability rules beyond the tackle-to-tackle period to the cargo's final destination. A "Himalaya clause" extends the terms of the bill of lading, including the contractual extension of COGSA, to parties with whom the ocean carrier has subcontracted for inland transportation.

c. Under COGSA, the parties may agree to a liability limitation. The default (and minimum) liability cap is $500 per package. (Notes Sec. 4(5)). Shippers and carriers typically opt to retain COGSA's liability limitation; shippers pay a reduced transport rate that reflects the carriers' reduced risk, and (like the shippers in this case) obtain private insurance for the excess value of their goods. *Kirby*, 543 U.S. at 19-21 (citation omitted). COGSA otherwise forbids any clause eliminating or "lessening" the carrier's statutory liability, (Notes Sec. 3(8)), but this Court has recognized that a forum selection clause does not violate that provision. *Sky Reefer*, 515 U.S. at 535-37.

Factual Context

1. During March and April 2005, Defendant "K" Line accepted cargo shipments to be carried from Shanghai, China to various delivery points within the United States. Pet.App.2a. These shipments for "through" (door-to-door) transportation of cargo were

undertaken pursuant to multi-year contracts between "K" Line and the shippers, and under through bills of lading issued by "K" Line for the particular cargo.

The intermodal through bills of lading that govern the shipments in this case—like the vast majority of such contracts—contain both a Himalaya clause (extending the terms to any subcontractors) and a clause paramount (extending COGSA to the inland leg). Pet.App.6a & nn.4, 5. The through bills authorize "K" Line "'to sub-contract *on any terms whatsoever* Carriage ... by any of the following: (I) any Connecting Carrier ... (III) sub-contractors, ... agents and independent contractors ....'" JA-145, JA-156, JA-168, JA-180 (emphasis added). The bills of lading also include a forum selection clause like the one this Court considered in *Sky Reefer*, providing that "'any action [under the bill of lading] or in connection with Carriage of Goods shall be brought before the Tokyo District Court in Japan, to whose jurisdiction [the shippers] irrevocably consent.'" JA-144, JA-155, JA-167, JA-179.

2. Through its American agent, "K" Line America, Inc., "K" Line contracted with UP to provide the inland rail transportation contemplated by the through bills of lading. Pet.App.4a-6a.

The "Exempt Rail Transportation Agreement" ("ERTA") to which "K" Line and UP agreed incorporated liability terms from UP's "Master Intermodal Transportation Agreement" ("MITA"). The MITA quotes UP's currently offered terms for intermodal transportation, all of which has been exempted from regulation by the STB. Pet.App.7a. The MITA explicitly invokes §10709 (the ICA opt-out provision) and offers the option of Carmack-compliant liability terms for inland domestic carriage, provided

the nature of the goods is declared to UP. Pet.App.117a. (Without such disclosure, UP would have no way to price the insurance implicit in Carmack's expansive liability regime.) Consistent with its right under the ocean bill of lading to subcontract "on any terms whatsoever," "K" Line instead elected a cheaper non-Carmack shipping option.

3. The cargo was loaded on vessels in Shanghai and Hong Kong, carried across the Pacific Ocean to Long Beach, California, and then delivered to UP to be carried by rail to its final destination. Pet.App.39a. The cargo allegedly was damaged when the train carrying it derailed in Oklahoma. Pet.App.3a.

Proceedings Below

1. a. Plaintiffs sued "K" Line, KAM, and UP in Los Angeles Superior Court. UP removed the actions to the United States District Court for the Central District of California. Pet.App.7a. Thereafter, UP and the ocean carrier defendants moved to dismiss based on the Tokyo forum selection clause in the bills of lading. Pet.App.7a-8a. Plaintiffs argued that the action was wholly governed by the Carmack Amendment, and that Carmack rendered the Tokyo forum selection clause unenforceable.

b. Relying on *Neptune Orient Lines, Ltd. v. Burlington Northern & Santa Fe Railway Co.*, 213 F.3d 1118 (9th Cir. 2000), the district court first held that the Carmack Amendment applies to "'the *inland leg* of an overseas shipment conducted under a single "through" bill of lading,' such as the one in this case." Pet.App.44a (citation omitted).

The district court further held the parties had contracted out of Carmack under 49 U.S.C. §10709. Pet.App.45a. Because §10709 "specifically

contemplates that the parties to a rail service contract may contractually agree to litigate in a forum other than that provided by the Carmack Amendment," the district court concluded, Plaintiffs' actions must be brought in Tokyo. Pet.App.46a.

2. The United States Court of Appeals for the Ninth Circuit reversed, rejecting UP's contention that Carmack does not apply to inland shipments governed by maritime through bills of lading.

a. The court of appeals recognized the settled law in several other circuits that Carmack *does not* apply to the inland leg of a continuous intermodal shipment from a foreign country under a through ocean bill of lading. Pet.App.17a. "Despite this weight of authority," the court held, "our own precedent expressly forecloses" that interpretation. *Id.* (citing *Neptune*, 213 F.3d at 1119).

b. The court of appeals next considered whether the "the parties' explicit contractual extension of COGSA inland should take precedence" over Carmack. Pet.App.19a.

The Ninth Circuit first acknowledged that "[t]he unanimous Court in *Kirby* ... observed that an inability to extend COGSA's default rules to inland transport, so that entire shipments could be governed by the same liability regime, would defeat 'the apparent purpose of COGSA[] to facilitate efficient contracting ... for carriage by sea.'" Pet.App.24a (fourth alteration in original). It further observed that "[i]gnoring a contractual provision incorporating COGSA seems particularly inappropriate where, as here, 'the parties to the bill of lading were sophisticated business entities that should rarely be released from contractual obligations.'" Pet.App.25a (citation omitted). The

Ninth Circuit recognized that the "policies recently endorsed by the Supreme Court [in *Kirby*]—such as uniformity in the law of maritime contracts and contractual autonomy for sophisticated shippers and carriers—recommend applying COGSA here." Pet.App.12a. It nevertheless concluded that "*Kirby* does not control," Pet.App.25a, and that contractual extensions of COGSA lack statutory force and must give way to "conflicting law," Pet.App.23a & n.13 (citing 46 U.S.C. §30701 (Notes Secs. 7, 12, 13)).

c. The Ninth Circuit next considered UP's argument that it and "K" Line had contracted out of Carmack under 49 U.S.C. §10709. Pet.App.26a.

The court noted that "the Board has exempted the transportation at issue here," and observed that an exemption does not itself relieve a carrier of its obligations under Carmack. Pet.App.27a-28a (citing 49 U.S.C. §10502(e)). Lamenting the lack of "guidance regarding how to read §10502 and §10709 in tandem," Pet.App.31a, the Ninth Circuit concluded that exempt carriers may not contract out of Carmack through §10709. It reasoned that exempt services are not "'*subject to the jurisdiction of the Board*'" for purposes of §10709, Pet.App.28a-29a (quoting 49 U.S.C. §10709(a)) (emphasis added by court of appeals), even though it had concluded that such transportation *is* subject to the jurisdiction of the Board for purposes of applying Carmack in the first instance. Pet.App.18a (holding that "Carmack's reach is coextensive with the Board's jurisdiction"). Neither the Ninth Circuit nor the shippers have contended that the MITA's terms were deficient in any other respect under §10709.

Adopting the Second Circuit's holding in *Sompo*, the Ninth Circuit held that §10502 "requires carriers

providing *exempt* transportation to offer Carmack protections before they can successfully contract for alternative terms." Pet.App.29a. The Ninth Circuit acknowledged that UP's MITA agreement offered "*K" Line* the option to "'select the liability provisions set forth in [Carmack]'" for domestic transportation. Pet.App.33a (quoting the MITA). The Court of Appeals held, however, that UP could not rely on its contract with "K" Line unless "K-Line ... offer[ed] Carmack's protections when contracting with *Plaintiffs*." *Id.* (emphasis added). The court remanded for a determination of whether "K" Line offered Carmack-compliant terms to the shippers in China. Pet.App.35a.

SUMMARY OF ARGUMENT

Only five years ago, this Court considered a case remarkably similar to this one, and held that an inland rail carrier was entitled to rely on the liability terms negotiated by an overseas shipper and an ocean carrier in a maritime through bill of lading. *Kirby*, 543 U.S. at 18. This Court explained that if the terms of an ocean bill of lading for containerized, intermodal transport did not "apply equally to all legs of the journey" then federal maritime policy would be frustrated and "the apparent purpose of COGSA, to facilitate efficient contracting in contracts for carriage by sea, would be defeated." *Id.* at 29. The relevant facts here are not materially distinguishable. Once again the overseas shippers are trying to sue a downstream rail carrier for relief inconsistent with the terms to which they agreed.

The Ninth Circuit's decision rests on the premise that in *Kirby* this Court somehow failed to notice the Carmack Amendment—which has governed the liability of interstate railroads in this country, when it

applies, for more than 100 years. That premise is incorrect. The Carmack Amendment did not apply to the shipment in *Kirby*, and it does not apply here, for at least two sets of reasons.

I. First, the Carmack Amendment has never applied to the inland leg of an import shipment moving under a through bill of lading.

The key to this issue is that the pre-1978 statutory language and precedents control the interpretation of Carmack because the 1978 codification bill states that it was intended to codify the ICA "without substantive changes" and "may not be construed as making a substantive change in the laws replaced." The pre-1978 statute makes clear that outside of purely domestic commerce Carmack applies *only* to shipments "from any point in the United States to a point in an adjacent foreign country"—*i.e.*, exports to Canada and Mexico. 49 U.S.C. §20(11) (1976).

Prior to the Second Circuit's 2006 decision in *Sompo* it was settled law for nearly a century that Carmack's language meant what it said. As late as 1979, a federal district court explained that "[t]he cases interpreting the Carmack Amendment have uniformly held that the Carmack Amendment has no application to goods received for shipment at a point outside the United States." *Kenny's Auto Parts, Inc. v. Baker*, 478 F. Supp. 461, 463-64 (E.D. Pa. 1979). The Second Circuit reached a contrary conclusion in *Sompo* only because it believed that in *Galveston, Harrisburg & San Antonio Railway Co. v. Woodbury*, 254 U.S. 357 (1920), this Court construed identical "from ... to" language in §1 of the ICA to embrace imports as well as exports. But as the contemporaneous courts understood, the language of §1 and of Carmack *were never* identical, and this

Court's reasoning in *Woodbury* does not apply to the different language Congress used in Carmack.

Even if the *Woodbury* reasoning *were* applicable to Carmack, a holding that "from ... to" also embraces "to ... from" still would not permit a court to ignore the separate limitation that Carmack applies only to shipments involving an "adjacent" foreign country. China is not adjacent to the United States, so there is no plausible reading of the operative language that could embrace the shipment at issue here.

Any remaining interpretive doubt should be resolved by this Court's holding and reasoning in *Kirby*. The efficient conduct of international trade in the era of containerized shipping requires that parties must be able to agree on, and be bound to, consistent terms governing every leg of an intermodal shipment. As this Court made clear in *Kirby*, the parties' freedom to extend the terms of an ocean bill of lading inland is critical to what Congress hoped to achieve in COGSA. An interpretation of Carmack that does not extend to the inland leg of typical ocean shipments therefore best reconciles the body of the law considered as a whole.

II. Even if Carmack does apply to the inland leg of an ocean shipment moving under a through bill of lading, the parties here opted out of it.

This shipment moved under an agreement negotiated between "K" Line and Union Pacific pursuant to 49 U.S.C. §10709, which allows "rail carriers providing transportation subject to the jurisdiction of the Board" and "purchasers of rail services" to agree by contract for "specified services under specified rates and conditions." 49 U.S.C. §10709(a). Parties to such contracts "shall have no duty in connection with services provided under such

contract other than those duties specified by the terms of the contract," the contract "shall not be subject to" the ICA, and its terms "may not be subsequently challenged before the Board or in any court on the grounds that such contract violates a provision of" the ICA. 49 U.S.C. §§10709(b), (c). UP and "K" Line voluntarily agreed to specific contractual terms, and those terms "may not be challenged ... in any court" based on alleged requirements stemming from any provision of the ICA.

The Ninth Circuit reached a contrary conclusion because it believed that for exempt traffic any contract nonetheless must comply with §10502(e)—which the Ninth Circuit believed would require UP to search out the original shippers in China to ensure that "K" Line had offered them the option of full Carmack coverage. The Ninth Circuit's reasoning is wrong on several levels.

First, the Ninth Circuit erred by supposing that §10709 is unavailable because exempt traffic is no longer "subject to the jurisdiction of the Board." 49 U.S.C. §10709(a). An exemption under §10502 relieves a rail carrier from the obligation to comply with provisions of the ICA, but it can be partial and it is always revocable. The Board cannot give away its *jurisdiction*. If exempt traffic were not "subject to the jurisdiction of the Board," then Carmack would not apply either. *Compare id.* §11706(a).

Second, the Ninth Circuit also erred by concluding that §10502(e) would be superfluous if §10709 is available in the context of exempt shipping. Section 10502(e) provides that "[n]o exemption order issued pursuant to this section shall operate to relieve any rail carrier from an obligation to provide contractual terms

for liability and claims which are consistent with [Carmack]," although "[n]othing in this subsection or [Carmack] shall prevent rail carriers from offering alternative terms nor give the Board the authority to require any specific level of rates or services based upon the provisions of [Carmack]." *Id.* §10502(e). That proviso states a limit on the legal effect of an STB exemption order. It is not necessary, to give that limitation substance, to read into it an additional limitation on the contractual freedom of the shipping parties that does not appear in the text.

Third, UP's published MITA does offer shipping terms consistent with Carmack. "K" Line, like most shippers, simply elected a cheaper option under which UP assumed more limited liability. That was a sensible decision in light of "K" Line's own limited liability under the bill of lading, the Himalaya clause extending the bill of lading's protections to subcontractors, and "K" Line's right to subcontract for rail services "on any terms whatsoever."

The Ninth Circuit erred by remanding for an investigation as to whether "K" Line made Carmack-compliant rail shipping terms available to its own customers in China. For reasons explained in "K" Line's brief, it is not a rail carrier and has no Carmack obligations of its own. And any obligation that *UP* had was satisfied by the shipping terms it made available to "K" Line. This Court held in *Kirby* that an ocean carrier like "K" Line can negotiate downstream terms for rail shipment and bind the cargo owners, even if those owners have no notice of those terms and have not given the ocean carrier that authority. The fact that the shippers here expressly gave "K" Line the

right to subcontract "on any terms whatsoever" just gilds that lily.

ARGUMENT

I. THE CARMACK AMENDMENT DOES NOT APPLY TO IMPORT MOVEMENTS ON A THROUGH BILL OF LADING

The Ninth Circuit's decision should be reversed on the threshold ground that the Carmack Amendment simply does not apply to an import shipment from a foreign country (particularly a *non-adjacent* country) moving under a through bill of lading. Except for a handful of recent aberrations, that rule was settled law for nearly a century. It is essential to the sensible and efficient conduct of international trade, and to the important maritime policies this Court recognized in *Kirby*.

A. The Pre-1978 Statutory Language Controls This Case

Prior to the 1978 bill that recodified the ICA and enacted that codification into positive law, for more than 50 years the Carmack Amendment excluded the transportation at issue here. Carmack only covered domestic interstate transportation and transportation "from any point in the United States to a point in an adjacent foreign country." 49 U.S.C. §20(11) (1976). As the Second Circuit correctly recognized in *Sompo*, the pre-codification language is controlling. 456 F.3d at 65. To the extent the language used in the 1978 recodification suggests any broader application, that suggestion is a mere drafting error that Congress has instructed the courts to disregard.

Congress could not have been more clear on this point. The 1978 codification bill states that Congress's

intent was to codify the ICA "without substantive changes," and expressly commands that the new codification "may not be construed as making a substantive change in the laws replaced." *See* Pub. L. No. 95-473, §3, 92 Stat. at 1466. That is not mere legislative history, but the text of the bill as enacted by both Houses and signed by the President. This Court has acknowledged that unambiguous mandate, *see Burlington N. R.R. Co. v. Okla. Tax Comm'n*, 481 U.S. 454, 457 n.1 (1987), and it controls interpretation of the statute in the same manner that any overarching interpretive instruction or definitional provision would. Congress has instructed, for example, that when construing statutes the courts must assume that the singular includes the plural and the masculine includes the feminine (and vice versa), 1 U.S.C. §1, that snorkeling fins are a "vessel" and rollerskates are a "vehicle," *id.* §§3, 4, and that "marriage" does not include unions recognized as such in several States and the District of Columbia, *id.* §7. If Congress provided that for purposes of CERCLA liability a person is not the "owner" of land purchased after 2005, this Court would honor that instruction.

There is no reason for this Court not to give similar respect to the plain statutory language mandating how the ICA must be interpreted. Codification bills are a useful but non-substantive housekeeping process, *see, e.g.*, 2 U.S.C. §285 *et seq.*, and necessarily receive less careful scrutiny than new legislation. *See* H.R. Rep. No. 95-1395, at 10, *reprinted in* 1978 U.S.C.C.A.N. at 3019 ("Since the purpose of H.R. 10965 is to codify changes in the law without making any substantive change in the law, no oversight findings or recommendations have been made with respect to the

bill."). An interpretive command like this one provides a useful safeguard in case what is, in effect, a scrivener's error goes undetected. The legislative history confirms what the statute says, and makes clear that Congress's *only* real interest in the 1978 bill was in being assured by the Office of Law Revision Counsel that it would not and could not change the law in any respect.[1]

Even when a codification bill does not expressly command that it "may not be construed" as altering prior law, this Court has applied a strong presumption that such bills are not intended to change the substance of the law unless a contrary purpose is "clearly expressed." *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 227 (1957); *see also, e.g., Keene Corp. v. United States*, 508 U.S. 200, 209 (1993); *Finley v. United States*, 490 U.S. 545, 554-55 (1989); *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 317-18 (1985); *Cass v. United States*, 417 U.S. 72, 81-82 (1974). In *Cass*, for example, this Court refused to give effect to a rounding provision in the codified version of

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[1] *See, e.g.*, H.R. Rep. No. 95-1395, at 9, *reprinted in* 1978 U.S.C.C.A.N. at 3018 ("[T]his bill makes no substantive change in the law."); *id.* (explaining that in "the usual kind of amendatory legislation ... it can be inferred that a change of language is intended to change substance" but that "[i]n a codification statute ... the courts uphold the contrary presumption: the statute is intended to remain substantively unchanged"); *id.* at 3027 ("Should a question ever arise concerning this change, section 3 of the bill would require the legal conclusion that no change in substance was intended"); 124 Cong. Rec. 30,172 (1978) ("H.R. 10965 restates the Interstate Commerce Act and related laws without substantive change ... ."); *id.* at 31,449 ("[T]his bill would make no substantive changes, intentional or unwitting, in substantive law.").

10 U.S.C. §687(a) stating, without limitation, that "[f]or purposes of this subsection ... a part of a year that is six months or more is counted as whole year ...." 417 U.S. at 73 n.1. A literal application of that requirement would have changed the eligibility requirements for readjustment pay for military reservists, from 5 years to 4 years and 6 months of continuous active duty. Noting that the "committee reports accompanying the codification proposal make plain that no change in the eligibility requirements for readjustment pay was intended by the enacted change in phraseology," *id.* at 81, this Court held that the prior version of the statute was controlling. *Id.* at 81-82.

Here we have far better evidence of Congress's wishes than a mere committee report—an explicit instruction in the statute itself. And the new language in Carmack certainly is not clear enough to indicate that Congress intended to override, for that provision alone, its broader interpretive command. In an obvious attempt to streamline the phrasing, the codifiers in 1978 simply replaced the cumbersome "from ... to" language in the original Carmack Amendment with "for transportation under this subtitle," 49 U.S.C. §11707(a)(1) (Supp. II 1979), which in subsequent revisions has now become "for transportation under this part," 49 U.S.C. §11706(a). As "K" Line explains in its brief, the present "under this part" language can be read in a manner consistent with the traditional rule, without any Orwellian feats of construction. Indeed, it would do much less violence to the plain language than the Court was willing to accept in *Cass*. In any event, Congress's command is clear. The present language "may not be construed" as changing the prior law.

B. The Carmack Amendment Has Never Applied To Imports Moving Under A Through Bill Of Lading

The plain language of the pre-1978 Carmack Amendment makes clear that Carmack applies *only* to domestic commerce and exports to adjacent countries. For decades the courts (including this Court) and the ICC understood that language to mean what it said.

Early decisions of the ICC recognized that Carmack does not apply to import movements. Two months after Congress passed the Cummins Amendment, the ICC considered whether Carmack as amended "appl[ies] to export and import shipments to and from foreign countries not adjacent to the United States." *In re Cummins Amendment*, 33 I.C.C. 682, 693 (1915). The ICC determined that "[t]his must be answered in the negative, in view of the fact that, while specifically stating that its terms shall apply to property received for transportation from certain points to certain other points, it makes no reference to shipments from a point in the United States to a point in a nonadjacent foreign country, or from a nonadjacent foreign country to a point in the United States." *Id.* The ICC reaffirmed that view in *Heated Car Service Regulations*, 50 I.C.C. 620, 623-24 (1918), recognizing that "the so-called Cummins amendment to the act to regulate commerce does not relate to traffic moving from points in an adjacent foreign country to points in the United States." *See also, e.g., Bills of Lading Cases*, 52 I.C.C. 671, 726-29 (1919) (explaining that "the Cummins Amendment did not apply to export and import shipments to and from foreign countries not adjacent to the United States").

This Court's 1920 decision in *Woodbury* is not to the contrary. *Contra Sompo*, 456 F.3d at 66. *Woodbury* interpreted §1 of the ICA, which defined the ICC's regulatory jurisdiction to embrace (among other things) "any common carrier ... engaged in the transportation of passengers or property ... from any place in the United States to an adjacent foreign country." Act of June 18, 1910, ch. 309, §7, 36 Stat. 539, 545. That language focused on *carriers* "engaged in" certain fields of transportation. This Court explained that "[t]he test of the application of the act is not the direction of the movement, but the nature of the transportation as determined by the field of the carrier's operation," and emphasized that "[a] carrier engaged in transportation by rail *to* an adjacent foreign country is, at least ordinarily, engaged in transportation also *from* that country to the United States." *Woodbury*, 254 U.S. at 359-60. Mrs. Woodbury herself was traveling on a round-trip ticket from Canada. *Id.* at 358.

By contrast, the pre-1978 Carmack language did not impose Carmack obligations on common carriers "engaged in" certain general fields of transportation. It required that "[a]ny common carrier ... receiving property for transportation ... from any point in the United States to a point in an adjacent foreign country shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss." 49 U.S.C. §20(11) (1976). The "from any point in the United States to a point in an adjacent foreign country" language in Carmack does not describe the carrier's field of operation, but rather the route *and direction* of a particular shipment. Carmack distinguishes, for example, between the obligations of the "receiving"

and "delivering" carriers, which would be reversed if the movement were in the opposite direction.[2] Whereas in *Woodbury* this Court could say that a carrier "engaged in" import shipments is also (at least ordinarily) "engaged in" exports and therefore generally covered by the Act, particular property is either "receive[d] ... for transportation" into the United States or out of it—not both. In other words, unlike the provision construed in *Woodbury*, for the Carmack Amendment the "test of the application of the act" has always been the "direction of the movement"—*not* the "nature of the transportation as determined by the field of the carrier's operation." *Woodbury*, 254 U.S. at 359-60; *see also Reider v. Thompson*, 339 U.S. 113, 117 (1950) (Carmack turns on "where the obligation of the carrier as receiving carrier originated").[3]

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[2] The statute's distinctions among receiving, connecting, and delivering carriers also confirm that downstream carriers transporting property under a through bill of lading already issued by a different carrier (such as a U.S. railroad moving goods under an import through bill) are not required to issue their own, Carmack-governed, bill of lading—even though in a colloquial sense they have "received" property for transportation within the United States. Receipt of property for transportation has a particular meaning under the statute, which embraces *only* the first carrier issuing the bill of lading.

[3] This Court's reference in *Woodbury* to "the Carmack Amendment under which carriers may limit liability by published tariff," 254 U.S. at 359, is not a holding that Carmack's liability provisions applied to the movement in question. The case this Court cited, *Boston & Maine Railroad v. Hooker*, 233 U.S. 97 (1914), actually explains that a carrier's ability to limit liability for baggage by published tariff derives from *§6* of the ICA, not from Carmack (then §20(11)), and thus exists whether Carmack applies or not. This Court was merely referring to the baggage provisions

The statutory scope of §1 had always been broader than that of Carmack. As originally enacted, Carmack applied only to transportation of property "from a point in one State to a point in another State," even though the ICC's jurisdiction at the same time also embraced carriers engaged in transportation of property *or passengers* to, from, and within territories, "from any place in the United States to an adjacent foreign country," and "from any place in the United States through a foreign country to any other place in the United States," as well as shipments of property "from any place in the United States to a foreign country and carried from such place to a port of transshipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country." *Compare* ch. 3591, §7, 34 Stat. at 595 *with id.* §1, 34 Stat. at 584. In other words, §1 of the Act always embraced the inland leg of foreign shipments, but Carmack did not. The Cummins Amendment in 1915 broadened Carmack to include shipments involving territories and the District of Columbia, and shipments

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of the 1915 and 1916 Cummins amendments, which made clear that even if Carmack did apply a liability limitation for passenger baggage would still be enforceable. The question of Carmack's scope was thus irrelevant to the issues in *Woodbury*, and both parties agreed with the Texas state court below that Carmack *did not* actually apply to that shipment. *See* Brief of Petitioner at 16, *Woodbury*, 254 U.S. 357 (1920) (No. 1003); Brief of Respondents at 2, *Woodbury*, 254 U.S. 357 (1920) (No. 1003); *see also, e.g., Alwine v. Pa. R.R. Co.*, 15 A.2d 507, 511 (Pa. Super. Ct. 1940) ("The limitation of liability upheld by the Supreme Court [in *Woodbury*] existed independent of the Carmack amendment."). Even the *Sompo* panel conceded that "the *Woodbury* Court interpreted the 'from ... to' language only in that section of the ICA defining the ICC's jurisdiction," *not* "in Carmack." 456 F.3d at 66.

"from any point in the United States to a point in an adjacent foreign country." *See* ch. 176, 38 Stat. at 1197. But it conspicuously *did not* include the language then in §1 embracing the inland legs of foreign transshipments.

Congress confirmed its intent to give §1 a broader scope than Carmack while *Woodbury* was pending. After the Texas appellate court held in *Woodbury* that the ICA did not apply, Congress amended §1 to simplify the language in a manner that still clearly extended to the domestic leg of both import and export movements. *See* Act of Feb. 28, 1920, ch. 91, §400, 41 Stat. 456, 474 (replacing "from ... to" with "from or to ... to or from"). Although Congress revised Carmack at the same time, it *did not* change the language limiting Carmack's application to foreign trade to exports to adjacent countries. *Id.* at 494-95. This Court's subsequent holding in *Woodbury* confirms that the amendment to §1 was unnecessary. But Congress's failure to amend Carmack at the same time is telling.[4]

The influential decision of *Alwine v. Pennsylvania Railroad Co.*, 15 A.2d 507, 508 (Pa. Super. Ct. 1940), later explained that the ICC jurisdictional provision construed in *Woodbury* was "a general provision describing the field which Congress has taken over. It defines the common carriers and forms of

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[4] The *Sompo* panel misunderstood the timing of those amendments, *see* 456 F.3d at 66-67, which caused it to draw the mistaken inference that Congress was reacting to this Court's holding in *Woodbury*—which actually was not rendered until ten months later. But even if *Sompo*'s account of the timing were correct, Congress's action would not support the inference drawn by the *Sompo* court. Congress deliberately changed the wording of the jurisdictional provision, while leaving Carmack unchanged.

transportation about which it proposes to legislate." *Id.* at 512. "That portion of the first section [construed in *Woodbury*] dealt with the space to be occupied rather than the direction in which transportation moved. Consequently, *from* was held to be equivalent to *between*." *Id.* The court then distinguished the language of Carmack, which specifically defines the transportation to which it applies by reference to direction of movement. "Because the same phrase used in a different connection and under different circumstances was ambiguous does not require us to discard the plain meaning of the words employed in [Carmack], where there is no ambiguity." *Id.* The *Alwine* court also pointed to Congress's 1920 amendments to §1 that left the relevant language of Carmack unchanged, and the risk of "extra-territorial legislation" inherent in a broader reading of Carmack, to confirm that Congress meant what it said. *Id.*

Alwine's persuasive reasoning was subsequently adopted by the overwhelming majority of courts to consider the issue in the ensuing decades. *See, e.g., Sklaroff v. Pa. R.R. Co.*, 184 F.2d 575, 575 (3d Cir. 1950); *Strachman v. Palmer*, 82 F. Supp. 161 (D. Mass. 1949), *aff'd in relevant part*, 177 F.2d 427 (1st Cir. 1949); *Reider v. Thompson*, 176 F.2d 13 (5th Cir. 1949), *rev'd on other grounds*, 339 U.S. 113 (1950); *Kenny's Auto Parts*, 478 F. Supp. at 463-64; *Condakes v. Smith*, 281 F. Supp. 1014, 1015 (D. Mass. 1968); *Becker & Co. v. Wabash R.R. Co.*, 55 N.W.2d 776 (Mich. 1952); *Carr v. Erie Lackawanna R.R. Co.*, 85 Misc. 2d 713 (N.Y. Sup. Ct. 1972); *Leary v. Aero Mayflower Transit Co.*, 207 S.E.2d 781 (N.C. Ct. App. 1974); *Whaling v. Atlas Van Lines, Inc.*, 919 F. Supp. 168, 170 (E.D. Pa. 1996). Counsel have been able to identify only one reported

decision inconsistent with that consensus: the New York municipal court's decision in *Goldberg v. Delaware, Lackawanna & W. R.R. Co.*, 40 N.Y.S.2d 44 (N.Y. Mun. Ct. 1943), which was decided only three years after *Alwine*, does not cite any of the mainstream decisions, committed the same error as *Sompo* in misunderstanding this Court's decision in *Woodbury*, and was expressly disapproved in *Strachman* and *Sklaroff*.

The *Alwine* line of decisions recognized that Congress had good reasons to distinguish between the general scope of the ICC's jurisdiction and the specific scope of the Carmack Amendment, which regulates the terms of bills of lading. A through bill of lading for an import shipment is a contract negotiated and executed in another country, governing (at least initially) transportation in that country or on the high seas. The cases reasoned that "it is at least doubtful whether Congress could constitutionally regulate the Canadian carrier's liability for an event ... occurring in Canada in connection with a contract made in Canada by a Canadian corporation ... ." *Strachman*, 82 F. Supp. at 164. Although Congress has regulatory power over a shipment after it crosses into the United States, it is often unclear exactly where damage occurred. Enforcing a presumption (as Carmack would) that damage occurred within Congress's territorial jurisdiction "might raise problems of constitutional delicacy" and in any event "might seem to laymen to be unfair." *Id.*; *see also Alwine*, 15 A.2d at 512 (explaining that the original version of Carmack would have involved "extra-territorial legislation" if applied to import movements). Those observations are valid even if, in the end, this Court would have sustained

Congress's power to regulate more broadly. *See, e.g.*, *Knott v. Botany Mills*, 179 U.S. 69, 74-75 (1900).

This Court twice considered the scope of the Carmack Amendment between *Woodbury* and the 1978 codification. In *Missouri Pacific Railroad Co. v. Porter*, the railroad issued an "export bill of lading in two parts" governing a rail shipment from Arkansas to Georgia followed by ocean transport to Liverpool, England, and which purported to disclaim liability for damage by fire. 273 U.S. 341, 342 (1927). This Court recognized that "the Carmack Amendment, the Cummins Amendment, or §25 does not apply to such a shipment"[5] and that "[n]o Act of Congress or order of the commission prescribed a form of bill of lading for this shipment." *Id.* at 345. This Court nonetheless held that the Arkansas statutes purporting to bar disclaimers of liability were preempted by the ICC's (as-yet unexercised) general authority *under §1 of the Act* to regulate the terms of export bills of lading.

Porter subsequently spawned confusion because the export bill of lading had been issued "in two parts," such that arguably there were separate bills of lading governing the inland and ocean legs. *Id.* at 342. This Court's opinion therefore could have been read to suggest that the inland leg of an export movement to a non-adjacent country is outside the scope of the Carmack Amendment *even if there is no through bill of lading*. The Fifth Circuit drew that conclusion in

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[5] Section 25 was designed to encourage cooperation between U.S. railroads and the U.S. merchant fleet, and imposes particular requirements related to export movements involving a U.S.-flagged ocean vessel. It did not apply in *Porter* because this Court assumed that the shipment involved a foreign-flagged ship. *See* 273 U.S. at 345.

Reider v. Thompson, which considered an import shipment from Buenos Aires to New Orleans, followed by a domestic shipment from New Orleans to Boston under a separate bill of lading issued in New Orleans. 176 F.2d at 14. Citing *Alwine*, the court of appeals held that "the Carmack Amendment does not extend the liability of domestic carriers to cover shipments arising in a foreign country, and intended for through transportation to a point within the United States." *Id.* The Fifth Circuit further held that the separate domestic bill of lading "d[id] not interrupt or affect the continuity and foreign character of the shipment" because the inland "carrier's bill of lading shows on its face that it was issued in furtherance of the original foreign shipment, and that no new, separate, or distinct domestic shipment was intended." *Id.*

This Court granted certiorari and reversed on the second point, emphasizing that "[t]here was no through bill of lading from Buenos Aires to Boston," that "[t]he contract for ocean transportation terminated at New Orleans," and that "[i]f the various parties dealing with this shipment separated the carriage into distinct portions by their contracts, it is not for courts judicially to meld the portions into something they are not." *Reider*, 339 U.S. at 117. This Court stated that its prior "discussion of the Carmack Amendment [in *Porter*] does not control our decision in this case," because the only issue in *Porter* was whether the Arkansas statutes were preempted. *Id.* at 116 n.1. *Reider* expressly reserved judgment on whether *Alwine* was correctly decided and on whether the Carmack Amendment would have applied if there had been a through bill of lading from Buenos Aires to Boston. *Id.* at 117-18. But this Court's core reasoning in *Reider* strongly supports

Alwine's holding. This Court held that the applicability of Carmack turns upon "where the obligation of the carrier as receiving carrier originated"—in that case, New Orleans, where the "contract for ocean transportation terminated." *Id.* at 117. If the domestic rail carrier in *Reider* had been transporting the goods to Boston under an ocean through bill, it would have been a connecting or delivering carrier—and the obligation of the receiving carrier would have originated in Buenos Aires. *Balt. & Ohio R.R. Co. v. Montgomery & Co.*, 90 S.E. 740 (Ga. Ct. App. 1916), cited with approval by this Court in *Reider* on this very point, 339 U.S. at 117, illustrates the governing law as it was understood at the time.

After *Reider* the lower courts continued to adhere to the *Alwine* rule—often citing this Court's reasoning in *Reider* in support. As the district court explained in *Kenny's Auto Parts* in 1979, "[t]he cases interpreting the Carmack Amendment have uniformly held that the Carmack Amendment has no application to goods received for shipment at a point outside the United States." 478 F. Supp. at 464 (collecting cases); *see also, e.g., Condakes*, 281 F. Supp. at 1015 (holding that under *Reider* Carmack did not apply to the domestic leg of an import shipment originating in Mexico and moving under a through bill, and that the U.S. railroad was not the "receiving carrier"). That was the "uniform" state of the law in 1978, when Congress emphasized that its codification made "no substantive change in the law" and that "the precedent value of earlier judicial decisions and other interpretations" remained in force. H.R. Rep. No. 95-1395, at 9, *reprinted in* 1978 U.S.C.C.A.N. at 3018. And despite the differences between the pre- and post-codification text, the courts

that interpreted Carmack between 1978 and 1995 adhered to the settled understanding that Carmack applied to the inland portion of an international multimodal shipment only if a separate domestic bill of lading was issued. *See Swift v. Textiles, Inc. v. Watkins Motor Lines, Inc.*, 799 F.2d 697, 701 (11th Cir. 1986), *cert. denied*, 480 U.S. 935 (1987); *Capitol Converting Equip., Inc. v. LEP Transp., Inc.*, 965 F.2d 391, 394-95 (7th Cir. 1992); *Shao v. Link Cargo (Taiwan)*, 986 F.2d 700, 703-04 (4th Cir. 1993).[6] "Congress was aware of ... and, in effect, adopted" that consistent judicial interpretation when it again reenacted Carmack in 1995 without substantive change. *Keene*, 508 U.S. at 212 (citing *Lorillard v. Pons*, 434 U.S. 575, 580 (1978)).

The language chosen by the 1978 codifiers, standing alone, certainly does not demonstrate that Congress harbored a different understanding. As "K"-Line explains, that language can be understood in a manner consistent with the traditional rule. In any event, extracting a contrary rule solely from the 1978 text, in

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[6] As *Sompo* pointed out, *Swift* is a poorly reasoned decision. The Eleventh Circuit stated that the domestic leg of an import shipment "will be subject to the Carmack Amendment as long as the domestic leg is covered by separate bill or bills of lading," but appeared to conclude that the absence of a through bill of lading to the final destination was irrelevant on the facts presented because the shipment nonetheless "was intended to be part of a larger shipment originating in a foreign country." *Swift*, 799 F.2d at 701. The Eleventh Circuit's formulation of the test approximates the traditional *Alwine* rule, but in applying that test the court of appeals appears to have committed an error similar to the one this Court reversed in *Reider*. Fortunately, subsequent courts have cited *Swift* for the test it articulated rather than its application of that standard.

opposition to all evidence of what the statute meant before 1978 (including the plain language and settled agency and judicial precedent), would make a mockery of Congress's command that the codification text may not be construed as changing the prior law.[7]

C. Carmack Does Not Apply To *Any* Trade With Non-Adjacent Foreign Countries

Even if *Sompo* were correct that under *Woodbury* "from ... to" always means "from or to ... to or from," the Carmack Amendment *still* would not apply to the vast majority of intermodal shipping on a single through bill of lading (including the shipment in this case) because of the statutory limitation to trade with countries "adjacent" to the United States. The *Sompo* panel acknowledged that limitation, but was compelled to follow prior Second Circuit precedent that it admitted was not well reasoned. 456 F.3d at 68 n.13.

The limitation to shipments involving "adjacent" countries reinforces Congress's obvious desire to exclude maritime shipping, including associated inland rail transport on a single through bill of lading, from the scope of Carmack.

D. Federal Maritime Policy And This Court's Decision In *Kirby* Strongly Support The Traditional Rule

Only five years ago, this Court held that a railroad's

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[7] Justice Stevens suggested *in dissent* in *Keene* that if "Congress intended no substantive change in 1948, that would mean only that the present text is the best evidence of what the law has always meant, and that the language of the prior version cannot be relied upon to support a different reading." 508 U.S. at 221 (Stevens, J., dissenting). This Court was not persuaded.

liability for damage on the inland leg of an import shipment moving under a through bill of lading was governed by the terms of that bill, and that federal maritime policy requires that parties must have the "efficient choice" to elect uniform, consistent, limited liability rules governing both the ocean and inland legs of an intermodal shipment. *Kirby*, 543 U.S. at 26. An ocean carrier "would not enjoy the efficiencies of the default rule" if the terms of the bill of lading "did not apply equally to all legs of the journey for which it undertook responsibility." *Id.* at 29. "And the apparent purpose of COGSA, to facilitate efficient contracting in contracts for carriage by sea, would be defeated." *Id.*

Even if this Court did not implicitly resolve these issues in *Kirby*, the federal maritime policies it articulated should resolve any remaining interpretive doubt. This Court recognized the strong policies, endorsed by Congress in COGSA, favoring the freedom to contract for uniform terms governing an entire intermodal shipment. In the age of containerized intermodal shipping it would be incredibly "inefficient ... [to apply] different substantive law to the container depending on whether it is sitting on board a ship, on a rail car, or on a truck." *Indem. Ins. Co. of N. Am. v. Hanjin Shipping Co.*, 348 F.3d 628, 636 (7th Cir. 2003). And even if the Ninth Circuit was correct that a contractual extension of COGSA's default rules does not have the force of law sufficient to displace a contrary statute, Pet.App.26a, the fact that Congress included that option in COGSA at all strongly indicates that Congress believed parties could use it. The Ninth Circuit's view of the world essentially turns that provision into a dead letter. As this Court explained

when interpreting COGSA in *Sky Reefer*, "'[w]hen two statutes are capable of coexistence, ... it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.'" 515 U.S. at 533 (citations omitted).

A reading of Carmack that excludes the inland leg of foreign commerce moving under a through bill of lading also is more consistent with the core purposes of Carmack itself. As this Court recognized in *Atlantic Coast Line Railroad Co. v. Riverside Mills*, 219 U.S. 186 (1911), the whole point of the Carmack Amendment was to force the receiving carrier to issue a through bill of lading and accept responsibility (vis-à-vis the shipper) for the entire journey rather than disclaiming responsibility for damage occurring beyond its own lines. This Court explained that a single, clear locus of responsibility under a through bill was essential because the shipper often will be unable to prove where in the journey any damage occurred. *Id.* at 200. In that sense Carmack and COGSA share the same policy objective: to encourage through bills and discourage shipping arrangements under which legal responsibility and the governing law are fractured. Neither statute can achieve that goal if they are interpreted to overlap, covering different legs of the same shipment.

In *Heated Car Service Regulations*, after recognizing that Carmack did not apply to the inland leg of an import shipment, the ICC rejected a proposal that it should exercise its own authority under §1 to regulate the domestic leg of import through shipments from Canada. The ICC reasoned, in part, that such regulation "might result in a difference in the character of the liability of the Canadian and that of the

American lines" and "might also involve the necessity, in order to fix the liability of the respective lines participating in the service, of opening the cars at the border to ascertain the condition of the traffic at that point." 50 I.C.C. at 623. The ICC expressed doubt about whether such arrangement would be "practicable" or "satisfactory either to the carriers or to the shippers." *Id.* Any interpretation of Carmack that would extend to the inland leg of ocean shipments governed by COGSA would have similar undesirable consequences.

The problem with uncertainty about the location of freight damage identified by this Court in *Riverside Mills* and by the ICC in *Heated Car Service Regulations* has only become more acute. Damage often is not even discovered until a sealed container reaches its destination, at which point there may be no way to know whether the damage occurred at sea or over land. In *Reider*, this Court made clear that even when Carmack *does* apply to an inland leg (there, because a separate bill of lading was issued) the inland rail carrier cannot be held liable for damage occurring on the ship. 339 U.S. at 118. In the legal regime contemplated by the Ninth and Second Circuits, therefore, cases involving cargo damage discovered at the destination will be governed *neither* by the parties' maritime contracts nor by Carmack—but instead will require some threshold determination about where the damage occurred. What substantive standards will govern that litigation, when Carmack does not specify any? Where will it occur, when (as here) the contracts between the shipper and the ocean carrier specify an overseas forum for all disputes and the ocean shipper may not even be amenable to suit in the venues

specified by Carmack? Congress obviously did not intend such an unwieldy regime.

II. CARMACK DOES NOT APPLY HERE BECAUSE THE PARTIES HAVE OPTED OUT OF THE ICA

Under 49 U.S.C. §10709, parties to a contract for specified rail services may contractually opt out of the ICA altogether, including the Carmack Amendment. The Ninth Circuit below acknowledged that the direct parties to the rail service contract here (UP and "K" Line) intended to do so. But the Ninth Circuit wrongly believed that for exempt shipments (which currently includes all intermodal shipments) the parties to a shipping contract cannot agree on non-Carmack liability terms unless the actual cargo owner is first offered alternative Carmack-compliant terms. *See* Pet.App.28a-29a. That holding is incorrect on several levels.

A. Section 10709 Is Available To Carriers Providing Exempt Transportation

Congress enacted the Staggers Act in 1980 "to rid railroads of unnecessary and inefficient regulations that impeded the railroads' ability to compete with other modes of transportation." *Tokio Marine & Fire Ins. Co. v. Amato Motors, Inc.*, 996 F.2d 874, 877 (7th Cir. 1993). Section 208(a) of the Staggers Act added the provision now codified at §10709, and §213 of the Act added subsection (e) to the provisions now codified at §10502. *See* Staggers, §§208(a), 213, 94 Stat. at 1908, 1912-13. Through different mechanisms, §§10709 and 10502 operate to remove rail carriers from the requirements of the ICA.

Under §10709, "rail carriers providing transportation subject to the jurisdiction of the Board under [Part A] may enter into a contract with one or more purchasers of rail services to provide specified services under specified rates and conditions." 49 U.S.C. §10709(a). Parties to a 10709 contract "shall have *no duty* in connection with services provided under such contract" beyond the terms of their contract, and such contracts "may not be subsequently challenged before the Board or in any court on the grounds that such contract violates a provision of [the ICA]." *Id.* §§10709(b), (c)(1) (emphasis added). Section 10709 explicitly permits contracting parties to agree to the venue in which any contract dispute would be litigated. *Id.* §10709(c).

Section 10502 empowers *the STB* to "exempt a person, class of persons, or a transaction or service" from the ICA's requirements. Section 10502 is directed solely at the STB's regulatory exemption power, as demonstrated by its heading—"Authority to exempt rail carrier transportation"—and the plain language of its various subsections. *See Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 128 S. Ct. 2326, 2336 (2008) (explaining that "statutory titles and section headings 'are tools available for the resolution of a doubt about the meaning of a statute'" (quoting *Porter v. Nussle*, 534 U.S. 516, 528 (2002))). Subsection 10502(e) limits the STB's exemption power in one crucial respect. An STB exemption order will not alone relieve a rail carrier from Carmack's default liability provisions:

> *No exemption order* issued pursuant to this section shall operate to relieve any rail carrier from an obligation to provide contractual terms for liability and claims

> which are consistent with the provisions of section 11706 of this title [*i.e.*, Carmack].

49 U.S.C. §10502(e) (emphasis added). Although Congress withheld this power from the *STB*, Congress made clear in the next sentence of §10502(e) that this limitation does not affect the ability of the exempt *carrier* to contract out of Carmack:

> *Nothing in this subsection* or section 11706 of this title *shall prevent rail carriers from offering alternative terms* nor give the Board the authority to require any specific level of rates or services based upon the provisions of section 11706 of this title.

Id. (emphasis added).

Section 10502(e) thus carves out from the STB's power the ability to issue a blanket exemption from Carmack, while preserving the ability of shippers and carriers to modify Carmack's terms by whatever means the ICA permits—including the simultaneously enacted §10709. *See Wachovia Bank, N.A. v. Schmidt*, 546 U.S. 303, 315-16 (2006) (provisions of the same Act of Congress should be construed *in pari materia*).[8] This lawsuit violates §10709(c)(1)'s command that the terms of a §10709 contract "may not be subsequently challenged before the Board or in any court on the grounds that such contract violates a provision of this part." Respondents' argument, and the Ninth Circuit's

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[8] Conversely, §10709(f) states a limit on the legal effect of a §10709 contract—that the carrier "remains subject to the common carrier obligation set forth in section 11101, with respect to rail transportation not provided under such a contract"—that does not constrain the *STB*'s separate power under §10502(a) to release railroads from common carrier obligations if the Board concludes that those requirements are no longer necessary.

holding, is precisely that the §10709 contract agreed to by UP and "K" Line somehow violates requirements imposed by §10502(e)—which of course is "a provision of this part" within the meaning of §10709(c)(1).

The Ninth Circuit's contrary conclusion is deeply flawed. First, the Ninth Circuit held that §10709 is not available for exempt shipments because such shipments are no longer "transportation subject to the jurisdiction of the Board" within the meaning of §10709(a). That holding rests on the implausible premise that this transportation *is* within the jurisdiction of the Board for purposes of determining whether the Carmack Amendment applies, but is *not* within the jurisdiction of the Board for purposes of §10709, even though the relevant language of the two provisions is identical. Nothing in the text or the history of the provisions suggests that Congress intended such a result.

The text and structure of §10502 demonstrate that a discretionary exemption does not strip the Board of jurisdiction over the exempted transportation. The STB retains the power to revoke an exemption at any time. *See* 49 U.S.C. §10502(d). As the ICC explained, "unless this revocation power is a nullity, the granting of an exemption is not—and cannot be—a permanent abrogation of federal jurisdiction. The potential for total or partial reimposition of regulation is always present." *Consol. Rail Corp.–Declaratory Order–Exemption*, 1 I.C.C.2d 895, 899 (1986). "Granting an exemption on the basis of the statutorily required findings merely affects 'the *application* of a provision of [the ICA].' Facially, the statute does not empower the ICC to remove any matter from its statutory jurisdiction." *Id.* at 898 (citation omitted) (alteration in

original). As this Court reminded UP earlier this very Term, an agency never has the power to give away "jurisdiction" that Congress conferred. *See Union Pac. R.R. Co. v. Brotherhood of Locomotive Eng'rs*, No. 08-604, slip op. at 2 (Dec. 8, 2009).

The Ninth Circuit also erred in concluding that §10502(e) is meaningless if §10709 is available in the context of exempt carriage. Section 10502(e) states a limit on the legal effect of an STB exemption order. It is not necessary, to give that limitation substance, to read into it an additional limitation on the contractual freedom of the shipping parties that does not appear in the text. *See* 49 C.F.R. §1090.2 ("The exemption does not ... operate to relieve any carrier of any obligation *it would otherwise have, absent the exemption*, with respect to providing contractual terms for liability and claims.") (emphasis added).

The United States has recognized that exempt transportation may contract out of the ICA through §10709. In its Invitation Brief urging the Court to grant certiorari in *Kirby*, the United States (joined by the STB) stressed that "the rail transport in this case was provided as contract carriage under 49 U.S.C. 10709, which would make the transport exempt from the Carmack Amendment's liability rules." Brief for United States as Amicus Curiae at 12, *Kirby*, 543 U.S. 14 (2004) (No. 02-1028) ("U.S. *Kirby* Invitation Brief"). The United States was well aware that the rail carrier in *Kirby*, as in this case, was providing exempt transportation under 49 C.F.R. §1090.2. *Id.* at 11 n.4. It even explained that "data maintained by the Surface Transportation Board reflect that most (approximately 56% by revenue) multimodal, containerized rail freight is transported under such contract-carriage

arrangements, to which the Carmack Amendment's liability regime does not apply." *Id.* at 12.

B. UP Provided Carmack-Compliant Alternative Terms To "K" Line

Regardless, any requirement imposed by §10502(e) was amply satisfied here. The Ninth Circuit believed that §10502(e) required "K" Line to make an explicit offer of Carmack-compliant rail shipping terms to the shippers in China before anyone could agree to non-Carmack terms, and that factual uncertainty about whether such an offer had been made requires a remand. Pet.App.33a. But what "K" Line offered or did not offer to the shippers in China is irrelevant, as a matter of law. For reasons explained in "K" Line's brief, it is not a "rail carrier" and has no Carmack obligations of its own. And any obligations *UP* had were satisfied by the terms it made available to "K" Line.

UP explained in its petition for certiorari, and the brief in opposition did not contest, that "K" Line had the practical option to re-bill this shipment as domestic and elect Carmack terms (and rates). *See* Pet. 32; Pet.App.33a; "K"-Line Br. at 12; S. Ct. R. 15.2. UP's MITA is a published circular outlining the terms on which UP is willing to contract for exempt intermodal rail carriage. *See* JA-123 (cover page of MITA, formerly known as "UP Exempt Circular 20-B," which provides "[t]erms and conditions for the transportation of deregulated Intermodal Shipments"). Those terms are then implemented through ERTA contracts with particular shippers. As the Ninth Circuit recognized, the MITA specifically provides that "'[o]n domestic shipments that originate in the United States, Shippers may, at their option, select the liability provisions set

forth in [Carmack]'" if they are willing to pay a significantly higher freight rate. Pet.App.33a (quoting MITA) (first alteration in original). Like the shipper in *Reider*, "K" Line could have written its ocean bill of lading such that "the foreign portion of the journey terminated at the border of the United States," 339 U.S. at 117, and contracted with UP for a separate shipment with its own bill of lading originating in the United States. *See* JA-134-35 (MITA 7.7.B (providing that "International Shipments" that are "warehoused, processed, repackaged, etc., prior or subsequent to rail movement will not be considered international traffic and shall be rated as domestic Shipments")).[9] It simply chose not to, because it was authorized to subcontract for rail carriage "on any terms whatsoever." The shippers gave "K" Line that right because (as this Court recognized in *Kirby*) it is more efficient to buy insurance from an insurance company than from a railroad. 543 U.S. at 19-21.

An open invitation for contracting on Carmack-compliant terms, like UP's MITA, satisfies any

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[9] UP's freight rates on international through shipments are significantly lower than the comparable domestic rates. UP therefore makes an effort to ensure that true domestic movements are not passed off as the inland leg of an international through shipment. *Cf.* JA-134-35 (MITA 7.7.B.2 (providing that "international rates given to ocean carriers apply on international traffic moving on their Ocean Bill of Lading and in their specific owned or leased Containers. Any other traffic cannot be moved under these rates")). As the certiorari petition explained (at 32), UP would be perfectly happy to accept the rebilling of an international shipment into separate ocean and domestic legs, as occurred in *Reider*. *See* JA-135 (MITA 7.7.B.3)). As a practical matter, that almost never occurs—because the international through rates are lower.

obligation that §10502(e) might impose.[10] It would make no sense to require carriers to open every negotiation with a further ritualized statement reminding the shipper that Carmack-compliant terms would be available—particularly when almost no shipper is actually interested in such terms. Under the old common law, this Court recognized that an agreement for limited liability did not require that the parties actually discuss the alternative common law rule. *See Cau v. Tex. & Pac. R.R. Co.*, 194 U.S. 427, 430 (1904). Section 10502(e), which was enacted in the context of a broad deregulation of the rail industry, surely was not intended to require contracting parties to engage in a Kabuki dance before agreeing to the terms they want.

This Court held in *Kirby* that a railroad is entitled to treat its direct counterparty as the shipper, and not look behind whether that counterparty is the original cargo owner or instead a shipping intermediary. Intermediaries can bind shippers to terms with downstream carriers—even if, unlike here, the intermediary lacks contractual authority to do so.

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[10] The Ninth Circuit was confused about the relationship between the MITA, the ERTA, and the bill of lading, and wrongly saw a "factual morass" requiring a remand. Pet.App.34a n.22. For present purposes all that matters is that the MITA makes clear to the world that UP provides contractual terms consistent with Carmack that shippers may select. The interaction between the various contracts actually signed here is irrelevant, but not particularly complex. The rights between UP and "K" Line are defined by the ERTA. The shippers' rights against "K" Line are defined by the bill of lading. In an action by the shippers against UP, UP is entitled to the benefit of any limitations in the bill of lading (per the Himalaya Clause) *and* any limitations to which "K" Line agreed in the ERTA (per *Kirby*).

"When an intermediary contracts with a carrier to transport goods, the cargo owner's recovery against the carrier is limited by the liability limitation to which the intermediary and carrier agreed." 543 U.S. at 33. Relying on *Great Northern Railway Co. v. O'Connor*, 232 U.S. 508, 514 (1914), this Court held that a "'carrier ha[s] the right to assume that [the intermediary] could agree upon the terms of the shipment,'" *id.* at 34 (second alteration in original), and "could not be expected to know if the [intermediary] had any outstanding, conflicting obligation to another party," *id.* at 33. This Court explained that "[i]n intercontinental ocean shipping, carriers may not know if they are dealing with an intermediary, rather than with a cargo owner," and a rule requiring carriers to "seek out more information before contracting, so as to assure themselves that their contractual liability limitations provide true protection," would be wholly unworkable. *Id.* at 34-35. The necessary "information gathering might be very costly or even impossible," and carriers would want to charge shipping intermediaries higher rates, "interfer[ing] with statutory and decisional law promoting nondiscrimination in common carriage." *Id.* at 35. *Kirby*'s holding "produces an equitable result" because the cargo owner can always sue the party with which it initially contracted. *Id.*; *see also* Brief for United States as Amicus Curiae Supporting Petitioners at 29-30, *Kirby* (merits) (arguing that allowing the intermediary to bind the cargo owner to terms of shipment permits "the underlying carrier [to] base its rates on an accurate understanding of its potential exposure to suit, without discriminating among shippers in a manner that federal law forbids").

Against that backdrop, UP was entitled to treat "K" Line as the shipper for purposes of any requirements imposed by §10502(e) and Carmack. In a modern shipping contract with an ocean carrier like "K" Line, a railroad agrees to transport containers that were sealed on the other side of the world and may contain goods aggregated for efficiency by intermediaries from many different cargo owners. The railroad may have no idea who the ultimate shippers were, and no practical way to locate them. *See* U.S. *Kirby* Invitation Brief at 14 ("Nor is it feasible for subcontracting carriers to negotiate directly with cargo owners."). A rule that the railroad must contact such parties before it can agree to binding terms with the intermediary would, as this Court recognized in *Kirby*, be completely impractical and inconsistent with the railroad's obligation to deal with intermediaries on the same terms as cargo owners. And it would frustrate the efficiency of intermodal trade by making impossible for shippers to sign an effective, single contract for "door to door" shipment.

The brief in opposition suggested that railroads could protect themselves by extracting a promise from the ocean carrier that a Carmack-compliant option was offered to the cargo owner—or by insisting on an indemnity from the ocean carrier against any liability imposed under Carmack. Opp. 13. The purpose of Congress's expansive deregulation of rail transport has been to free railroads from complex administrative burdens and to permit sophisticated parties to rely on their contracts. An after-the-fact cause of action against the ocean carrier, which may or may not be solvent and subject to meaningful judicial relief in the U.S. courts, is no substitute for the railroad's right to

know in advance what the legal rights and responsibilities governing a particular shipment will be. *See* U.S. *Kirby* Invitation Brief at 14-15 (recognizing that "[i]ndemnity agreements also are not a satisfactory mechanism for providing certainty to subcontracting carriers"). UP cannot take the risk that it might be exposed to potentially enormous liability for damage to sealed, containerized cargo with such slender protection. At a minimum, the railroad will be incentivized to expend resources on wasteful and inefficient investigations, and to discriminate against intermediaries in favor of direct dealings with cargo owners—all in conflict with the policies discussed in *Kirby*.

The contractual relationships among the parties in this case (which are typical of modern international trade) just confirm the wisdom of allowing railroads to deal directly with intermediaries. The shippers here agreed to maritime bills of lading that expressly applied to inland carriage through a Himalaya clause and authorized the ocean carrier to subcontract for rail services "*on any terms whatsoever*." They made an efficient choice to contract with "K" Line for through transportation, rather than arranging for rail transportation directly. The shippers' recourse against "K" Line, and any subcontracting carrier, for damage to the cargo is explicitly limited by the terms of that bill—and the shippers obtained separate insurance to protect themselves from loss. That common arrangement reflects the obvious reality that shippers are in a far better position than carriers to insure against the risks of damage to sealed, containerized cargo. If the shippers had wanted a bill of lading with different terms (such as a requirement that "K" Line

choose Carmack-compliant rail carriage in the United States) the shippers could have negotiated for such terms, presumably at a higher cost.

After opting for the convenience and efficiency of one-stop shopping, and a price reflecting "K" Line's right to arrange rail transport "on any terms whatsoever," Plaintiffs and their insurers now seek to avoid the bargain they struck. But as this Court recognized 125 years ago, "it would be unjust and unreasonable, and would be repugnant to the soundest principles of fair dealing and of the freedom of contracting, and thus in conflict with public policy, if a shipper should be allowed to reap the benefit of the contract if there is no loss, and to repudiate it in case of loss." *Hart v. Pa. R.R. Co.*, 112 U.S. 331, 341 (1884).

CONCLUSION

This Court should reverse the judgment of the Ninth Circuit.

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RESPONDENT'S BRIEF

Nos. 08-1553 & 08-1554

IN THE
Supreme Court of the United States

KAWASAKI KISEN KAISHA, LTD. AND "K" LINE AMERICA, INC.,

AND

UNION PACIFIC RAILROAD COMPANY,
Petitioners,

v.

REGAL-BELOIT CORPORATION, VICTORY FIREWORKS, INC., PICC PROPERTY & CASUALTY CO. LTD., AND ROYAL & SUN ALLIANCE INSURANCE CO., LTD.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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February 12, 2010

QUESTIONS PRESENTED

1. Does the Carmack Amendment apply to the inland carriage of goods under a multimodal through bill of lading in the absence of a separate inland bill of lading?

2. Does the Carmack Amendment, 49 U.S.C. § 11706, apply to rail transportation in the United States that is part of a multimodal shipment originating in a foreign country when the Carmack Amendment's scope is coextensive with the jurisdiction of the Surface Transportation Board ("Board"), and the Board has jurisdiction over the domestic rail leg of transportation "between a place in . . . the United States and a place in a foreign country," *id.* § 10501(a)(1)-(2)(F)?

3. Can a rail carrier providing "exempt" transportation rely on 49 U.S.C. § 10709 to avoid its obligation to comply with the Carmack Amendment when the Board's exemption of that transportation from the provisions of subtitle IV of Title 49 includes § 10709?

4. Did the court of appeals properly remand these cases to the district court to determine whether petitioners offered the shippers a fair opportunity to choose Carmack-compliant venue terms when the record reveals no evidence that such an opportunity was afforded the shippers?

5. Did the court below properly employ a fact-specific and functional analysis to conclude that the Carmack Amendment applies to petitioner K-Line, which held itself out as a rail carrier, contracted with the shippers to provide transportation to inland destinations in the United States, and discharged that obligation by providing its own multimodal containers and subcontracting with petitioner Union Pacific for rail transportation?

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Rule 29.6 of the Rules of this Court, Regal-Beloit Corporation, Victory Fireworks, Inc., PICC Property & Casualty Co. Ltd., and Royal & Sun Alliance Insurance Co., Ltd. state the following:

Regal-Beloit Corporation has no parent company, and no publicly held company owns 10% or more of its stock.

Victory Fireworks, Inc. has no parent company, and no publicly held company owns 10% or more of its stock.

The People's Insurance Company (Group) of China owns more than 10% of the stock of PICC Property & Casualty Co. Ltd.

RSA Insurance Group plc is the ultimate parent corporation of Royal & Sun Alliance Insurance Co., Ltd.

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INTRODUCTION

These cases concern the proper forum for suits over damage to cargo for delivery to U.S. purchasers caused by a U.S. railroad's train derailment in Oklahoma on the inland domestic leg of an international multimodal shipment. Ever since the advent of the train, suits over cargo loss or damage from derailments have been litigated routinely in U.S. courts. Despite its own rail circular calling for suit to be brought in the United States, petitioner Union Pacific Railroad Company ("Union Pacific") joins an argument first made by the ocean carrier, petitioners Kawasaki Kisen Kaisha, Ltd. and "K" Line America, Inc. (collectively, "K-Line"). They both now contend that these suits must be litigated in Tokyo, Japan, based on contractual provisions in the ocean carrier's bills of lading.

More than a century ago, after decades of similar contractual efforts by railroads to evade their culpability for damaging property they were entrusted to carry, Congress enacted the Carmack Amendment to provide a uniform national regime governing rail carriers' liability for damage to cargo in the United States and to protect cargo owners from abuses by those carriers. As subsequently amended, the Carmack Amendment specifies particular venues in which cargo claimants may bring suit and does not permit carriers to impose forum-selection clauses requiring claimants to file actions in other locations. *See* 49 U.S.C. § 11706(d)(2).

In these cases, petitioners seek to establish that the Carmack Amendment does not apply to domestic rail shipments that are part of international, multimodal carriage. Thus, they would force respondents to travel to Japan to recover for losses caused by

Union Pacific's negligence in the United States. If the Court adopts petitioners' position, multimodal rail transportation such as the carriage at issue here would be unregulated, and owners of cargo damaged in the United States would be shut out of this Nation's courts. The result would be that owners of cargo carried in entirely domestic shipments would be protected by federal statute, but owners of cargo on an overseas shipment would have no federal statutory protection during the period when their goods are carried domestically, even if both sets of goods travel together on the same train or truck and the owners of the damaged cargo are all U.S. citizens. Petitioners offer no evidence that Congress enacted such an absurd regime.

Nor does Union Pacific acknowledge to this Court that, as a leading member of the Association of American Railroads ("AAR"), it pressed the Department of State and the international community to adopt *the exact opposite rule from the one it advocates here*. In international negotiations to establish a new set of internationally uniform rules, the railroads argued strenuously for applying each nation's domestic statute to rail or road carriage within that country. Now, Union Pacific seeks to have a nationally uniform statutory rule in the United States replaced by a court-sanctioned, unregulated contractual regime, in which cargo claimants would never be protected in the formation of contracts of carriage and would be forced to litigate domestic disputes in far-distant countries.

On the threshold issue here — the applicability of the Carmack Amendment's venue provisions — petitioners' gambit to revolutionize the venue rules for suits arising out of domestic rail transportation can-

not withstand scrutiny of the congressionally enacted statutory text. The Carmack Amendment applies to *any* "rail carrier providing transportation or service subject to the jurisdiction of the" Surface Transportation Board ("STB" or "Board"). 49 U.S.C. § 11706(a). The Board has jurisdiction "over transportation by rail carrier . . . between a place in . . . the United States and a place in a foreign country" to the extent the "transportation [is] in the United States." *Id.* § 10501(a)(1)-(2)(F). Therefore, because the transportation in these cases was from various ports in China (each "a place in a foreign country") to destinations "in . . . the United States," the Board has jurisdiction over the domestic portion of the transportation and the Carmack Amendment applies, as the Ninth Circuit correctly held. Petitioners' contrary contention requires this Court to apply "The Pre-1978 Statutory Language," as Union Pacific openly admits. U.P. Br. 20. Under the current statutory language, which the Court is bound to apply, petitioners cannot prevail.

Petitioners do not dispute that, if the Carmack Amendment governs, the contractual provisions that require respondents to bring these suits in Japan violate Carmack's venue provisions, 49 U.S.C. § 11706(d). Union Pacific asserts, however, that the Carmack Amendment also does not apply because its circular (formerly considered a tariff) claims to be governed by 49 U.S.C. § 10709, which permits rail carriers in certain circumstances to make alternate contractual arrangements for carriage. But, as the United States' brief explains, the STB has exempted the transportation at issue in these cases from § 10709, and Union Pacific therefore cannot rely on that provision.

Union Pacific further maintains that, even if the Carmack Amendment applies, it complied with Carmack and 49 U.S.C. § 10502(e) by offering Carmack-compliant forum terms to *K-Line*. But the statute requires such terms to be offered to the *shipper*, which petitioners cannot claim to have done. Union Pacific did not offer even K-Line an opportunity to select Carmack-compliant terms. Instead, Union Pacific's circular states that "Carmack liability coverage is **not** available for any Shipments that originate outside the borders of the United States of America." JA133.

Contrary to petitioners' assertions, these cases are far afield from *Norfolk Southern Railway Co. v. James N. Kirby, Pty Ltd.*, 543 U.S. 14 (2004). Unlike the uniformity this Court embraced in *Kirby*, petitioners' approach would produce the anomalous situation that train derailments in the United States would spawn litigation in multiple foreign forums (if the stakes could justify the expense) under a variety of different liability regimes even for the U.S. cargo interests that sustained the loss.

STATEMENT

I. STATUTORY BACKGROUND

A. Regulation Of Land Transportation

1. Legislative background

In 1887, Congress enacted the Interstate Commerce Act ("ICA"). *See* Act of Feb. 4, 1887, ch. 104, 24 Stat. 379 (subsequently codified as amended at 49 U.S.C. § 1 *et seq.* (1926) (recodified in 1978)). Before that time, domestic rail carriers had wide-ranging freedom of contract and could exercise their market power to impose arbitrary rates and terms on shippers. Additionally, rail carriers frequently discrimi-

nated against disfavored shippers or shipping markets by offering them less favorable rates and terms, while granting preferential service to other customers or markets. The ICA sought to curb those abuses by creating both uniformity and reasonableness in the rates, regulations, and terms for rail carriage in the United States.

As originally enacted, the ICA did not displace state law governing carriers' liability for injury or loss. *See Pennsylvania R.R. Co. v. Hughes*, 191 U.S. 477, 491 (1903). Rail carriers continued to accept shipments for carriage on multiple lines and to refuse liability for any portion of the journey that occurred on another carrier's line. That practice compelled a shipper "to make with each carrier in the route over which his package must go a separate agreement limiting the carrier liability of each separate company to its own part of the through route." *Atlantic Coast Line R.R. Co. v. Riverside Mills*, 219 U.S. 186, 199-200 (1911).

In 1906, Congress broadened the ICA's scope by enacting the Hepburn Act. *See* Act of June 29, 1906, ch. 3591, 34 Stat. 584. Section 7 of the Hepburn Act, popularly known as the Carmack Amendment, established uniform national rules governing liability of rail carriers. The purpose of the Carmack Amendment's liability regime was "to relieve shippers of the burden of searching out a particular negligent carrier from among the often numerous carriers handling . . . goods." *Reider v. Thompson*, 339 U.S. 113, 119 (1950). The Carmack Amendment created in the initial carrier unity of responsibility for the transportation of goods to their destination. *See Missouri, K. & T. Ry. Co. of Texas v. Ward*, 244 U.S. 383, 386 (1917). The initial carrier assumed that legal duty

"in spite of any contract, receipt, rule, or regulation which the carrier may impose in the bill of lading." 40 Cong. Rec. 9583 (1906) (statement of Rep. Bartlett). As one representative noted, "the initial carrier has a through-route connection with the secondary carrier, on whose route the loss occurred, and a settlement between them will be an easy matter, while the shipper would be at heavy expense in the institution of a suit." *Id.* at 9580 (statement of Rep. Richardson). By instituting that legal regime, Congress deliberately shifted an important burden from the shipper to the carrier and guaranteed the shipper a remedy against the carrier to which it had delivered the goods.

In 1913, this Court interpreted the original version of the Carmack Amendment to preserve carriers' common-law ability to offer shippers a lower rate in exchange for limiting their liability to a value declared in the bill of lading. *See Adams Express Co. v. Croninger*, 226 U.S. 491, 510-12 (1913). Two years later, Congress passed the First Cummins Amendment and provided that "any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any . . . bill of lading, or in any contract, rule, regulation, or in any tariff . . . is hereby declared to be unlawful and void." Act of Mar. 4, 1915, ch. 176, § 1, 38 Stat. 1196, 1197. The First Cummins Amendment also extended the Carmack Amendment, which previously had applied only to interstate carriage, to govern transportation between the United States and its territories and to transportation from the United States to an adjacent foreign country. *See id.*

In 1916, Congress retreated from the First Cummins Amendment's absolute prohibition on limited

liability when it passed the Second Cummins Amendment. *See* Act of Aug. 9, 1916, ch. 301, 39 Stat. 441. That statute supplemented the 1915 enactment with the proviso that it would not apply to "property . . . received for transportation concerning which the carrier shall have been . . . expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property." *Id.*, 39 Stat. 442. Carriers thus resumed their common-law ability to limit damages to a value declared by the shipper in exchange for a lower rate — albeit contingent on Interstate Commerce Commission ("ICC") authorization.

In 1978, Congress revised and recodified the ICA as subtitle IV of Title 49 of the United States Code. Congress maintained the substance of the Carmack Amendment, preserving its imposition of liability on multiple carriers handling a shipment and the ability of carriers to limit that liability in narrow, specified circumstances.

Congress made two changes to the scope of the Carmack Amendment, however. First, it clarified that the Amendment applies to both imports and exports. The version of the Carmack Amendment in force between 1915 and 1978 on its face applied only to international shipments "*from* any point in the United States *to* a point in an adjacent foreign country." 49 U.S.C. § 20(11) (1976) (emphases added). The recodified version replaced the "from . . . to" language with the word "between," clarifying that the Carmack Amendment applied to both exports and imports. *Id.* § 10521(a)(1) (Supp. II 1978). That linguistic clarification produced no substantive

change, however, as this Court had interpreted the prior language to include both imports and exports. *See Galveston, H. & S.A. Ry. Co. v. Woodbury*, 254 U.S. 357, 359 (1920) (explaining that a "carrier engaged in transportation by rail *to* an adjacent foreign country is, at least ordinarily, engaged in transportation also *from* that country to the United States").

Second, the 1978 recodification removed the limitation of the Carmack Amendment's applicability to shipments to or from *adjacent* foreign countries. *Compare* 49 U.S.C. § 10521(a)(1)(E) (Supp. II 1978) ("between a place in . . . (E) the United States and a place in a foreign country") *with id.* § 20(11) (1976) ("from any point in the United States to a point in an *adjacent* foreign country") (emphasis added).

In 1980, Congress significantly altered the regulation of the American rail industry by passing the Staggers Rail Act, Pub. L. No. 96-448, 94 Stat. 1895. Among other deregulatory provisions, the Staggers Rail Act gave the ICC broad authority to exempt persons, classes of persons, transactions, or services from most statutory provisions if it found that application of those provisions was unnecessary to serve the goals set out by Congress. *See id.* § 213, 94 Stat. 1912-13. But it placed an important limitation on that exemption authority, specifying that the ICC could not exempt rail carriers from the obligation to offer shippers terms for liability and claims that were consistent with the Carmack Amendment's requirements. *See id.* Congress also strengthened those requirements by adding an exclusive-venue provision to the Carmack Amendment that limited the jurisdictions where a civil action for cargo damage could be brought. *See id.* § 211(c), 94 Stat. 1911.

Finally, a 1995 statute produced the current version of the Carmack Amendment. Congress enacted the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 ("ICCTA"), which abolished the ICC and transferred its responsibilities to the Department of Transportation. In 1996, the STB replaced the ICC as the regulator of rail carriers.

2. Current statute

Currently, the Carmack Amendment provides that a receiving rail carrier and a delivering rail carrier are liable "for the actual loss or injury to the property caused by . . . (1) the receiving rail carrier; (2) the delivering rail carrier; or (3) another rail carrier over whose line or route the property is transported in the United States." 49 U.S.C. § 11706(a). A carrier held liable is "entitled to recover from the rail carrier over whose line or route the loss or injury occurred." *Id.* § 11706(b). The Carmack Amendment prohibits carriers from contracting to limit liability except in the same narrow circumstances allowed under the Second Cummins Amendment. *See id.* § 11706(c)(3)(A) (permitting a rail carrier to "establish rates for transportation of property under which [its liability] is limited to a value established by written declaration of the shipper or by a written agreement between the shipper and the carrier").

Finally, and most relevant to the current dispute, the Carmack Amendment specifies the exclusive venues for any civil action seeking recovery against a carrier for damage to cargo. Suit must be brought

> (i) against the originating rail carrier, in the judicial district in which the point of origin is located;
>
> (ii) against the delivering rail carrier, in the judicial district in which the principal place of

business of the person bringing the action is located if the delivering carrier operates a railroad or a route through such judicial district, or in the judicial district in which the point of destination is located; and

(iii) against the carrier alleged to have caused the loss or damage, in the judicial district in which such loss or damage is alleged to have occurred.

Id. § 11706(d)(2)(A).

B. Regulation Of Sea Transportation

Following World War I, the international community adopted the "Hague Rules," a multinational convention establishing a set of uniform rules relating to international carriage of goods by sea. The United States both ratified the Hague Rules and enacted the Carriage of Goods by Sea Act, ch. 229, 49 Stat. 1207 (1936) (*reprinted at* 46 U.S.C. § 30701 note) ("COGSA"), which is based on the Hague Rules. COGSA governs the carriage of goods "between the ports of the United States and ports of foreign countries," COGSA § 1(e), from "the time when the goods are loaded on to the time when they are discharged from the ship," *id.* § 13 — known to the shipping community as the "tackle-to-tackle" period. Although COGSA does not prevent the shipper and carrier from agreeing to other terms for the periods prior to the goods being loaded on the ship or after their discharge from the ship, *see id.* § 7, that right is subject to "any other law" regarding "the duties, responsibilities, and liabilities of the ship or carrier" during those "beyond the tackle" periods, *id.* § 12.

II. FACTUAL BACKGROUND

A. K-Line And Union Pacific

Petitioner (defendant below) Kawasaki Kisen Kaisha, Ltd. operates as a common carrier transporting cargo in containers designed to be carried on ocean vessels, barges, rail cars, or trucks. *See* K-Line Br. 8. Together with its wholly owned domestic subsidiary, petitioner (defendant below) "K" Line America, Inc. (collectively, "K-Line"), it sells multimodal transportation services — shipments that include both ocean and land carriage portions — for containerized cargo. *See id.* at 9-10. K-Line advertises itself as a "[s]pecialist[] in vessel, ocean terminal, and double-stack train operations and movement" and touts its "far reaching infrastructure of vessels, terminals, double-stack trains and containers all dedicated to providing a full range of transportation services." "K" Line America, Inc., http://www.k-line.com (last visited Feb. 9, 2010).

K-Line, as a vessel-operating common carrier, operates the ocean transport component of its services and provides the multimodal containers in which the cargo is packed.[1] Because it does not operate any rail lines between the West Coast ports

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[1] *See* K-Line Br. 8-9; *see also* Kawasaki Kisen Kaisha, Ltd. Combined Transport: Bill of Lading ("K-Line BOL") Terms, Import — Back, clause 10 (describing "Carrier's Container" and apportioning liability for damage to containers), *reprinted in* Appellants' Excerpts of Record, Tab 50, at 5, Case No. 06-56831 (9th Cir. filed July 2, 2007) ("C.A.E.R."). A more legible copy of the relevant version of the K-Line BOL is available at http://web.archive.org/web/20050209063158/www.kline.com/BL_Terms/BLTerms_IMPBLBack.asp (last visited Feb. 12, 2010). K-Line's current bill of lading is identical in all relevant respects and is available at http://www.kline.com/KAMBL_Terms/BL_Terms_Import_Back_Clauses.asp (last visited Feb. 12, 2010).

where its ocean vessels dock and the inland areas of the United States, K-Line subcontracts with railroads to provide the inland portion of its multimodal transportation services. Thus, K-Line entered into a long-term agreement with petitioner (defendant below) Union Pacific Railroad Co. ("Union Pacific"). *See* K-Line Br. 11. Under that agreement, known as the Exempt Rail Transportation Agreement ("ERTA"), K-Line agreed to tender at least 95% of its containerized multimodal traffic to Union Pacific. JA120 (ERTA § 2). K-Line agreed to furnish the multimodal containers and chassis, with Union Pacific providing the railcars and locomotives. JA121 (ERTA § 14(G)(1)-(2)). K-Line further agreed to pay Union Pacific a flat, per-container rate specified in the contract. *Id.* (ERTA § 5).

The ERTA, which functioned mainly as a volume and pricing contract, was not the only document governing the relationship between K-Line and Union Pacific. The railroad's Master Intermodal Transportation Agreement ("MITA") sets out additional terms and conditions that apply to all multimodal transportation handled by Union Pacific, including services provided under Union Pacific's ERTA agreement with K-Line. JA123-24. Among other terms, the MITA establishes the liability regime for multimodal services provided by Union Pacific. It sets Union Pacific's maximum liability for cargo loss or damage at the lesser of the cargo's origin value or $250,000. JA132 (MITA § 3.1(C)(3)). It also incorporates "any limitation on the value of claims imposed by any other rail carriers, motor carrier, marine carrier or freight forwarder" and states that "the value of the lowest maximum claim amount shall apply." *Id.*

The MITA also sets out the terms by which shippers can claim Carmack Amendment protections. But it declares plainly that "Carmack liability coverage is **not** available for any Shipments that originate outside the borders of the United States of America." JA133 (MITA § 3.2(D)). Finally, the MITA mandates that "[a]ll lawsuits for freight loss or damage must be filed in a court of competent jurisdiction in Omaha, Douglas County, Nebraska." JA134 (MITA § 3.3).

B. Respondents' Shipments

K-Line receives cargo shipments pursuant to service contracts that it executes with companies that ship goods. *E.g.*, JA183. Under those contracts, the shipper agrees to ship a certain number of cargo containers on K-Line's vessels. JA188 (§ IV).

In March and April 2005, respondents (plaintiffs below) or their subrogors[2] purchased cargo from shippers that had entered into service contracts with K-Line. Regal-Beloit, plaintiff in the lead case, purchased a cargo of electric motors to be shipped from Shanghai, China, to Indianapolis, Indiana. JA137-40. Plaintiff Victory Fireworks purchased a cargo of fireworks to be shipped from Beihai, China, to Minneapolis, Minnesota. JA160-62, 171. Marathon Electric, the subrogor of plaintiff PICC, purchased a cargo of electric motor parts to be shipped from Shanghai, China, to Milwaukee, Wisconsin. JA148-51. And United Steel & Fasteners, the subrogor of plaintiff Royal & Sun, purchased a cargo of retainer

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[2] Respondents PICC and Royal & Sun are the subrogated insurers of two consignees that purchased shipments of cargo destroyed when Union Pacific's train derailed. Under their insurance agreements, those insurer respondents paid the losses that the consignees suffered. They accordingly succeeded to the consignees' rights against petitioners.

nail castings to be shipped from Zhangjiagang, China, to Chicago, Illinois. JA172-75.

The shippers in China loaded each cargo into multimodal containers supplied by K-Line and transferred the containers back to K-Line. JA117-18. (A "multimodal" container is one that can be transported by ocean vessel, railroad, or truck; the benefit of multimodal containers is that the contents need not be unloaded at any point during the shipment.) K-Line issued a bill of lading for each shipment. "A bill of lading is a contract that 'records that a carrier has received goods from the party that wishes to ship them, states the terms of carriage, and serves as evidence of the contract for carriage.'" Pet. App. 5a n.3.[3] These bills of lading were "through bills," meaning that they covered the entire shipment from China to the inland U.S. destinations — not simply the part of the journey that would take place on K-Line's ocean vessels — and reflected K-Line's assumption of responsibility for the cargo throughout the entire route. *E.g.*, JA137-47 (through bill of lading for Regal-Beloit shipment). The bills of lading identified respondents (or, in the case of insurer respondents, their subrogors) as the "consignees" of the shipments. *E.g.*, JA137 (identifying Marathon Electric, a Regal-Beloit company, as "consignee" of the shipment). Each consignee assumed the risk of loss or damage to the cargo (vis-à-vis the Chinese sellers of the goods) when the cargo was loaded onto K-Line's vessels.

The bills of lading included several provisions that are relevant to this dispute. First, a "Governing Law and Jurisdiction" clause stated that "[t]he contract evidenced by or contained in this Bill of Lading shall

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[3] References to "Pet. App." are to the petition appendix filed in No. 08-1553.

be governed by Japanese law except as may be otherwise provided for herein." JA144. It further stated that any action in connection with the carriage of goods "shall be brought before the Tokyo District Court in Japan, to whose jurisdiction Merchant irrevocably consents." *Id.* Next, a provision known as a "Clause Paramount" stated that, "[w]ith respect to Goods shipped to, from or through US Territories, Carrier's responsibilities during the entire period (and not just during Water Carriage) from the time of receipt of Goods to the time of delivery of Goods shall be governed by the United States Carriage of Goods by Sea Act (US COGSA)." *Id.* By contrast, for shipments to countries other than the United States, K-Line's responsibility for damage outside the water carriage period would be governed by "any relevant provisions contained in any . . . national law" that would have applied had the cargo owners "made a separate and direct contract" for that stage of the carriage. C.A.E.R., Tab 50, at 5; *see also* K-Line BOL clause 3(B). The bills of lading also entitled K-Line "to sub-contract on any terms whatsoever Carriage . . . undertaken by Carrier in relation to Goods by . . . any Connecting Carrier." JA145. Finally, a provision known as a "Himalaya Clause" stated that any connecting carrier subcontractor "shall have the benefit of all provisions herein benefiting Carrier as if such provisions were expressly for their benefit." *Id.*

Under those bills of lading, K-Line carried all four shipments by ocean vessel from China to the port of Long Beach, California. There, the containers were unloaded from the ocean vessels and transferred onto rail cars pulled by Union Pacific locomotives and

bound for the midwestern United States. JA118.[4] The containers did not reach their destinations, however, because Union Pacific's train derailed outside of Tyrone, Oklahoma, on April 21, 2005. *Id.* The cargo was destroyed.

III. PROCEDURAL HISTORY

Following the derailment, in April 2006 each plaintiff separately filed suit against K-Line and Union Pacific in California Superior Court. Regal-Beloit sought $100,000 in damages, JA58; Victory Fireworks sought $40,893.70, JA45; PICC sought $12,524.07, JA51; and Royal & Sun sought $3,012, JA64.

Union Pacific removed each case to the United States District Court for the Central District of California. *E.g.*, JA65 (Regal-Beloit case removal notice). It asserted federal jurisdiction in part based on the Carmack Amendment. JA67.

Following removal, Union Pacific sought to transfer the consolidated cases to the United States District Court for the Southern District of New York. JA72-73. Its transfer motion relied on a choice-of-law clause in the contract between Union Pacific and K-Line, which specified that New York law would govern a cross-claim that the railroad had asserted against the ocean carrier. JA75-76. Union Pacific's motion further relied on the fact that nine other cases arising out of the Tyrone derailment were pending in the Southern District of New York, as well as the fact that most of the witnesses were located in states closer to New York than to California. JA80-81, 101 (listing 32 witnesses in the United States, 4 witnesses

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[4] The record does not reveal which company's representatives and equipment were used to unload the containers from the ship and place them on the rail cars.

in China, and no others). Respondents and K-Line opposed the motion. JA17 (docket entries 58-59). The district court denied transfer. JA20 (docket entry 76). It held that the Carmack Amendment provided exclusive venue in California, Illinois, Indiana, Oklahoma, Minnesota, or Wisconsin. *See* Order Denying Motion To Transfer Venue at 4, Case No. CV-06-03016 (C.D. Cal. Sept. 29, 2006).

Meanwhile, after Union Pacific had filed its transfer motion, K-Line moved to dismiss the complaints based on the forum-selection clause in its bills of lading, which required suits to be brought in Japan. *See supra* pp. 14-15, 16; JA14 (docket entry 46). Union Pacific subsequently joined in K-Line's motion. JA15-16 (docket entry 54).

The district court granted that motion and dismissed the consolidated cases. Pet. App. 47a. The court first held that the Japan forum-selection clause applied to respondents' claims because they alleged breach of the bills of lading. *Id.* at 42a. It next held that the Himalaya Clause allowed Union Pacific to claim the benefit of the forum-selection clause. *Id.* at 42a-43a. Finally, the court held that the Carmack Amendment's exclusive-venue provision did not bar enforcement of the forum-selection clause. The court reasoned that COGSA, which does not limit venue, covered the overseas leg of the shipments at issue. *Id.* at 45a. And, although the Carmack Amendment ordinarily would apply to the inland rail portion of the shipments, the court found that the bills of lading were contracts under 49 U.S.C. § 10709, which allows parties to agree to a venue not specified by the Carmack Amendment. *Id.* at 46a; 49 U.S.C. § 10709(c)(2) ("The exclusive remedy for any alleged breach of a contract entered into under this section

shall be an action in an appropriate State court or United States district court, unless the parties otherwise agree.").

Respondents appealed to the Ninth Circuit, which reversed the district court's order of dismissal and remanded the cases for further proceedings.

The court first rejected K-Line's argument that it was not a "rail carrier" and therefore could not be subject to the Carmack Amendment. A "rail carrier" includes "a person providing common carrier railroad transportation for compensation." 49 U.S.C. § 10102(5). "Railroad" transportation, in turn, includes not only railroad tracks and facilities but "intermodal equipment used by or in connection with a railroad." *Id.* § 10102(6)(A). Additionally, the court explained that "the Board's jurisdiction, which is coextensive with Carmack's coverage, includes 'transportation that is by railroad and water, *when the transportation is under common control, management, or arrangement for a continuous carriage or shipment.*'" Pet. App. 12a (quoting 49 U.S.C. § 10501(a)(1)(B)) (emphasis in original). Because K-Line transported the cargo under through bills of lading covering the entire journey and arranged for continuous carriage by subcontracting with Union Pacific, the court found that it met the statutory definition of a "rail carrier" under the Carmack Amendment. *Id.* at 13a.

The Ninth Circuit next rejected petitioners' argument that the Carmack Amendment cannot apply to a shipment from a foreign country into the United States under a through bill of lading. Ninth Circuit precedent expressly foreclosed that contention. *See id.* at 17a-18a (citing *Neptune Orient Lines, Ltd. v. Burlington N. & S.F. Ry. Co.*, 213 F.3d 1118, 1119 (9th Cir. 2000)). And the court refused to accept the

alternative argument that the purported extension of COGSA in the bills of lading to cover the inland route could trump the Carmack Amendment's application. The court reasoned that, although COGSA permits contractual extensions "beyond the tackles" to the inland portions of a shipment, COGSA does not say that such extensions take precedence over other federal statutes. *Id.* at 21a, 23a.

Having concluded that the Carmack Amendment — and therefore its venue provision — applied, the Ninth Circuit next addressed whether K-Line and Union Pacific could nonetheless contract for alternative terms under § 10709, as the district court held. It rejected petitioners' arguments. *Id.* at 26a-27a. The parties did not dispute that the STB has exempted multimodal shipments like those at issue here from most regulatory burdens, including rate regulation. *See* 49 C.F.R. § 1090.2. Because that exemption includes § 10709, the court of appeals concluded that carriers of exempt multimodal shipments, such as petitioners, cannot enter into a contract under § 10709. Pet. App. 32a.

The Ninth Circuit also explained that the STB's exemption does not relieve carriers of their obligations under the Carmack Amendment. *Id.* at 28a (STB not authorized to "'relieve any rail carrier from an obligation to provide contractual terms for liability and claims which are consistent with the provisions of section 11706,'" *i.e.*, the Carmack Amendment) (quoting 49 U.S.C. § 10502(e)). At the same time, however, the Board may not "prevent rail carriers from offering alternative terms." 49 U.S.C. § 10502(e). The Ninth Circuit read those two clauses of § 10502(e) to mean that "carriers providing exempt transportation are obliged to provide terms consis-

tent with Carmack's venue and liability protections to their shipper customers, but are ultimately free to contract for terms different from those in § 11706." Pet. App. 28a.

The Ninth Circuit remanded the consolidated cases to the district court to determine whether K-Line and Union Pacific had offered terms consistent with the Carmack Amendment before contracting for inconsistent terms. *Id.* at 34a-35a. It found the existing factual record insufficiently developed to answer that question. *Id.*

SUMMARY OF ARGUMENT

I. At the threshold, these cases concern whether the Carmack Amendment applies to the rail transportation during which Union Pacific's negligence destroyed respondents' cargo. The statute's plain language permits only one answer: it does. The Carmack Amendment applies to any "rail carrier providing transportation or service subject to the jurisdiction of the [STB]." 49 U.S.C. § 11706(a). The Board has jurisdiction "over transportation by rail carrier . . . in the United States between a place in . . . the United States and a place in a foreign country." *Id.* § 10501(a)(1)-(2)(F). Respondents' cargo was transported from ports in China (each "a place in a foreign country") to "place[s] in . . . the United States." By the statute's plain terms, therefore, the Carmack Amendment applies, as the Ninth Circuit correctly held.

Petitioners sought this Court's review to resolve an asserted circuit conflict over whether the Carmack Amendment applies to international through shipments absent a separate bill of lading covering the domestic inland leg. They have now essentially abandoned that issue, and properly so. The statutory

text contains no separate-bill-of-lading requirement. Indeed, the Carmack Amendment expressly provides that "[f]ailure to issue a receipt or bill of lading does not affect the liability of a rail carrier." *Id.* § 11706(a).

Petitioners' other arguments for why the Carmack Amendment does not apply lack merit (and involve no circuit conflict). Petitioners' assertions cannot be squared with the statutory text in force now and when Union Pacific's train derailed. Indeed, neither petitioner musters *any* argument based on that statutory text. Instead, they ask this Court to adopt "The Pre-1978 Statutory Language." U.P. Br. 20. But this Court must apply the congressionally enacted statute as it currently exists, not obsolete statutory language replaced decades ago.

In seeking to substitute a prior version of the statute for the current language, petitioners place great weight on the presumption that, when Congress recodifies a statute, it does not intend to change the statute's meaning. But, while that presumption may be a useful guide when statutory language is ambiguous, it cannot defeat the plain meaning of unambiguous statutory text. The governing statutory language contains no ambiguity, as petitioners implicitly concede by failing to offer an argument based on that language. Further, the current statutory provision was not part of a recodification, so the presumption on which petitioners rely is inapplicable in any event.

K-Line seeks to conjure up a conflict between the Carmack Amendment and another federal statute, COGSA, to obscure what is at stake in these cases: a choice between a federal statute that confers a U.S. forum and an unregulated contract asserting a for-

eign forum for cases arising from a U.S. train wreck. COGSA, however, does not apply to inland transportation, such as the rail transportation in these cases. To be sure, COGSA § 7 preserves a limited ability to apply liability terms agreed by the parties to inland transportation. But a contractual extension of COGSA's terms does not give them the force of statutory law. Furthermore, COGSA itself provides in § 12 that a contractual extension of COGSA inland must yield to "any other law which would be applicable in the absence of [COGSA]" – such as the Carmack Amendment. Petitioners neither cite COGSA § 12 nor explain why it does not fully refute their argument.

II. Petitioners do not dispute that, if the Carmack Amendment applies, the contractual provision that requires respondents to bring these suits in Japan violates the Carmack Amendment's venue provisions, 49 U.S.C. § 11706(d). *See, e.g.*, K-Line Br. 17 (admitting that "the Carmack Amendment . . . does not permit forum selection clauses"). Union Pacific argues, however, that the Carmack Amendment does not apply because its contract is governed by 49 U.S.C. § 10709. But, as the United States' brief explains, the STB has exempted the transportation at issue in these cases from § 10709. Union Pacific therefore cannot rely on that provision.

Union Pacific also contends that it complied with the Carmack Amendment and 49 U.S.C. § 10502(e) by offering Carmack-compliant forum terms to *K-Line*. But the statute requires such terms to be offered *to the shipper*. Here, there is no evidence that anyone offered the shippers contracts that either did not contain forum-selection clauses or contained forum terms that comply with the Carmack Amendment.

K-Line argues that its contracts with the shippers allowed it to subcontract for rail transportation on any terms, but (even if true) that does not establish the shippers were offered an opportunity to obtain rail transportation on Carmack-compliant terms.

In any event, Union Pacific did not offer even K-Line an opportunity to select Carmack-compliant terms. The forum-selection clause in the contract between Union Pacific and K-Line requires suit to be brought in Nebraska, which is not a forum identified by the Carmack Amendment. Further, that same agreement asserts that Carmack Amendment terms are "**not** available" for transportation originating outside the United States, such as the transportation at issue here. JA133.

III. Finally, K-Line contends that it is not a "rail carrier" and so cannot be subject to the Carmack Amendment. The Ninth Circuit correctly rejected that argument based on the record before it. The statutory provisions defining the term "rail carrier" and the STB's jurisdiction require a fact-specific inquiry as to whether a carrier such as K-Line that contracts to execute a multimodal shipment including rail carriage in the United States qualifies as a "rail carrier" in a particular case. The Board's jurisdiction, which is coextensive with the Carmack Amendment's reach, includes "transportation by rail carrier that is . . . by railroad *and water*, when the transportation is under common control, management, or arrangement for a continuous carriage or shipment." 49 U.S.C. § 10501(a)(1)(B) (emphasis added). K-Line contracted to provide transportation by railroad and water from points in China to destinations in the midwestern United States. It therefore cannot avoid as a matter of law the Carmack

Amendment's application to cargo damage occurring on the rail leg of that carriage.

IV. Petitioners assert that these cases are "[j]ust like" *Kirby*. U.P. Br. 2. But *Kirby* involved a choice between a contractual extension of a federal law (COGSA) and the possible application of 50 diverse and conflicting state laws. Here, the choice is between the continued application of a federal statute (the Carmack Amendment) and entirely unregulated transportation.

ARGUMENT

I. THE CARMACK AMENDMENT APPLIES TO THE DOMESTIC RAIL LEG OF A MULTIMODAL SHIPMENT "BETWEEN A PLACE IN . . . THE UNITED STATES AND A PLACE IN A FOREIGN COUNTRY"

As a threshold matter, this Court must first decide whether the Carmack Amendment applies to the rail transportation during which Union Pacific's negligence destroyed respondents' cargo. That straightforward, yes-or-no question can be answered by honoring the statutory text in force when Union Pacific's train derailed. If the Court finds that the Carmack Amendment applies, the Ninth Circuit properly reversed the district court for dismissing the suits on the ground that Tokyo, Japan, should be the forum for these suits.

In 1995, Congress enacted the present version of the Carmack Amendment. Notwithstanding the obvious relevance of the current statutory text, petitioners and their *amici* studiously avoid discussing it in their briefs. But the plain language of the Carmack Amendment as presently in force is clear: the Carmack Amendment applies to the shipments at issue in these cases.

Answering that threshold question requires this Court simply to determine the Carmack Amendment's scope, which requires the Court to decide whether the statute should be construed under the terms now in force or under terms Congress altered three decades ago. It does not require any choice between the Carmack Amendment and COGSA, or implicate any conflict between federal statutes. By its terms, COGSA is explicitly limited to ocean carriage and thus cannot apply with statutory force to the inland leg of a multimodal shipment. The Carmack Amendment is similarly limited to inland carriage and thus cannot apply with statutory force to the ocean voyage governed by COGSA.

If the Carmack Amendment does not apply here, then no statutory regime would govern the U.S. inland leg of virtually any multimodal shipment in foreign trade.[5] Carriers would have unfettered freedom to impose whatever terms they wished, including the freedom to relieve themselves of all liability for negligent cargo handling. For more than a century, every mode of commercial transportation has been subject to mandatory federal law that guarantees minimum rights for cargo interests whose cargo has been damaged through carrier negligence. Petitioners now seek to create a gaping hole in that network of statutory protection so that carriers can henceforth define their own liability rules, free of any regulation whatsoever. Total freedom from regulation promotes not greater uniformity but legal chaos.

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[5] Although the geographic scope of the Harter Act, 46 U.S.C. §§ 30701-30707, is somewhat broader than COGSA's, the Harter Act's application is generally understood to terminate when the ocean carrier delivers the goods to an inland carrier. *See, e.g., Mannesman Demag Corp. v. M/V Concert Express*, 225 F.3d 587, 592 (5th Cir. 2000).

Petitioners offer no sound reason for ignoring the uniform statutory regime that Congress enacted for the express purpose of governing inland transportation.

A. By Its Plain Terms, The Carmack Amendment Applies To The Domestic Inland Leg Of A Multimodal Shipment

This Court begins with the words of the statute in force when the incident giving rise to the lawsuit occurred. *See, e.g., Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004) ("The starting point in discerning congressional intent is the existing statutory text . . . and not the predecessor statutes. It is well established that 'when the statute's language is plain, the sole function of the courts — at least where the disposition required by the text is not absurd — is to enforce it according to its terms.'") (citations omitted). Because the Carmack Amendment as applied to railroads is now codified at 49 U.S.C. § 11706,[6] the Court accordingly must begin with that language. Section 11706(a) provides:

> A rail carrier providing transportation or service subject to the jurisdiction of the [STB] under this part [part A of subtitle IV of Title 49 of the United States Code] shall issue a receipt or bill of lading for property it receives for transportation under this part. That rail carrier and any other carrier that delivers the property and is providing transportation or service subject to the jurisdiction of the Board under this part are liable to the person entitled to recover under the receipt

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[6] The Carmack Amendment as applied to "motor carriers" (*i.e.*, the trucking industry) is currently codified at 49 U.S.C. § 14706.

> or bill of lading. The liability imposed under this subsection is for the actual loss or injury to the property caused by —
>
> (1) the receiving rail carrier;
>
> (2) the delivering rail carrier; or
>
> (3) another rail carrier over whose line or route the property is transported in the United States or from a place in the United States to a place in an adjacent foreign country when transported under a through bill of lading.
>
> Failure to issue a receipt or bill of lading does not affect the liability of a rail carrier. A delivering rail carrier is deemed to be the rail carrier performing the line-haul transportation nearest the destination but does not include a rail carrier providing only a switching service at the destination.

In providing that the Carmack Amendment governs rail carriers "providing transportation or service subject to the jurisdiction of the [STB] under [part A]," *id.* § 11706(a), Congress refers to 49 U.S.C. § 10501, which defines the Board's jurisdiction in this context. Section 10501(a) declares that "the Board has jurisdiction over transportation by rail carrier" in certain defined situations, including "transportation in the United States between a place in . . . the United States and a place in a foreign country." *Id.* § 10501(a)(2)(F).[7]

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[7] Section 10501(a)'s full text provides:

> (1) Subject to this chapter, the Board has jurisdiction over transportation by rail carrier that is —
>
> (A) only by railroad; or

Accordingly, carriage from Shanghai, Beihai, or Zhangjiagang (each indisputably "a place in a foreign country") to Indianapolis, Milwaukee, Minneapolis, or Chicago (each "a place in . . . the United States") is subject to the Carmack Amendment to the extent the railroad performs that carriage "in the United States." There is also no dispute that the rail journey that originated in Long Beach, California (where the goods were loaded on Union Pacific's train), and proceeded to Tyrone, Oklahoma (where Union Pacific's train derailed), was "transportation by rail carrier" and "transportation in the United States." Thus, the statute's plain language unambiguously extends the Carmack Amendment to the four shipments at issue here.

Petitioners and their *amici* studiously avoid discussing the statutory language in effect both now and at the time of the train derailment that gave rise to these lawsuits. Instead, they focus on prior historical materials that lack any governing legal force and

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(B) by railroad and water, when the transportation is under common control, management, or arrangement for a continuous carriage or shipment.

(2) Jurisdiction under paragraph (1) applies only to transportation in the United States between a place in —

(A) a State and a place in the same or another State as part of the interstate rail network;

(B) a State and a place in a territory or possession of the United States;

(C) a territory or possession of the United States and a place in another such territory or possession;

(D) a territory or possession of the United States and another place in the same territory or possession;

(E) the United States and another place in the United States through a foreign country; or

(F) the United States and a place in a foreign country.

effect. As at least K-Line concedes, every exercise in statutory interpretation *should* begin with the plain language of the statute. *See* K-Line Br. 22. But neither Union Pacific nor K-Line ever analyzes the version of § 11706 now in force — and certainly neither offers an interpretive theory for how the plain words can be construed to support the result they seek. *Cf.* U.P. Br. 20 (arguing that "The Pre-1978 Statutory Language Controls This Case"); K-Line Br. 41-49 (arguing that the scope of the Carmack Amendment is determined by the pre-1978 statutory language). The closest either petitioner comes to analyzing any post-1978 text (and even then not the current statute) is K-Line's recognition (at 42) that "the [1978] recodification facially obscured [the pre-1978] restriction" for which petitioners still argue.

It is remarkable in a statutory interpretation case for petitioners to contend that the court below has misconstrued a federal statute without even attempting to explain how the statutory language now in force could be interpreted to support their theory. Union Pacific at least recognizes petitioners' burden to demonstrate that the statutory language has the meaning they advocate, but passes the buck to K-Line. *See* U.P. Br. 23 ("As 'K' Line explains in its brief, the present [statutory] language can be read in a manner consistent with [petitioners' position], without any Orwellian feats of construction."). Not only did K-Line fail to fulfill that promise, but it was no more able than Union Pacific to offer an interpretation of the current statute — Orwellian or otherwise — supporting petitioners' position.[8] Because the

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[8] The only *amicus* to make any effort to construe the statutory language to support petitioners is the government. *See*

plain language "transportation in the United States between a place in . . . the United States and a place in a foreign country," 49 U.S.C. § 10501(a)(2)(F), unambiguously describes the shipments at issue here, the Carmack Amendment applies.

B. The Lack Of A Separate Bill Of Lading For The Domestic Inland Leg Of A Multimodal Shipment Does Not Defeat The Carmack Amendment's Applicability

At the petition stage, both petitioners focused on the so-called "separate bill of lading" requirement that four circuits have erroneously adopted. *See, e.g.*, U.P. Pet. 13-24, 26; K-Line Pet. 12-16. They contended that the inland leg of a multimodal shipment should be subject to the Carmack Amendment "only if a separate domestic bill of lading was issued." U.P. Pet. 26; *see also* K-Line Pet. 17. In their merits briefs, both petitioners functionally abandon that position.

U.S. Br. 20-21. As neither party advances that argument, this Court may simply ignore it. *See, e.g., Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 97 n.4 (1991) ("we do not ordinarily address issues raised only by *amici*"). In any event, the government's effort on this point — based entirely on the inclusion of the "adjacent foreign country" language in 49 U.S.C. § 11706(a)(3) — is so weak as to be virtually non-existent. Paragraph (a)(3) has no application to these cases; it governs the liability of railroads other than the "receiving" and "delivering" rail carriers, and there is no such railroad here. But the government asserts (without explanation or textual analysis) that the inclusion of the "adjacent foreign country" language in § 11706(a)(3) for some inexplicable reason means that § 11706 as a whole is limited by the phrase, even though the phrase is conspicuously absent not only from the rest of § 11706 but also from § 10501 (which determines the scope of § 11706). Such a bare *ipse dixit* represents no explanation of how the statute can be construed to reach petitioners' desired result.

The statutory text rebuts any claim of a separate-bill-of-lading requirement. Section 11706(a), incorporating § 10501(a), establishes only three requirements for Carmack coverage. *First*, the defendant must be a "rail carrier" offering transportation either by railroad or by railroad and water. Union Pacific is indisputably such a "rail carrier." We address K-Line's status below. *See infra* pp. 80-90. *Second*, transportation is covered only to the extent that it is "in the United States." 49 U.S.C. § 10501(a)(2). The rail journey from Long Beach to Tyrone was indisputably "in the United States." *Third*, the overall shipment must fall into one of the categories specified in the lettered sub-paragraphs of § 10501(a)(2), such as transportation "between a place in . . . the United States and a place in a foreign country." *Id.* § 10501(a)(2)(F). The four shipments here, from places in China to places in the United States, satisfy that requirement. By specifying three other requirements in considerable detail without imposing a separate-bill-of-lading requirement, therefore, the statutory text rejects the separate-bill-of-lading requirement implicitly.

The Carmack Amendment also *explicitly* rejects such a requirement. The statute declares that "[f]ailure to issue a receipt or bill of lading does not affect the liability of a rail carrier." *Id.* § 11706(a); *cf. id.* § 14706(a)(1) ("Failure to issue a receipt or bill of lading does not affect the liability of a [motor] carrier.").

Petitioners' earlier focus on the separate-bill-of-lading requirement was tactical, for that is the *only* issue in the case on which the lower courts conflict. *See* Br. in Opp. 10-12. Petitioners have now just as tactically abandoned the issue, all but ignoring it in their merits briefs. Indeed, Union Pacific frankly

concedes that *Swift Textiles, Inc. v. Watkins Motor Lines, Inc.*, 799 F.2d 697 (11th Cir. 1986) — the case in which the separate-bill-of-lading requirement originated — "is a poorly reasoned decision." U.P. Br. 34 n.6; *cf.* U.P. Pet. 17 (describing origin of separate-bill-of-lading requirement in *Swift Textiles*).

The separate-bill-of-lading argument *is* specious and derives from a stray dictum in *Swift Textiles* that contradicts the court's actual holding. In that dictum, the Eleventh Circuit said:

> [W]hen a shipment of foreign goods is sent to the United States with the intention that it come to final rest at a specific destination beyond its port of discharge, then the domestic leg of the journey (from the port of discharge to the intended destination) will be subject to the Carmack Amendment as long as the domestic leg is covered by separate bill or bills of lading.

799 F.2d at 701. But the Eleventh Circuit actually held that the inland domestic leg of an import from Switzerland was subject to the Carmack Amendment notwithstanding that no domestic bill of lading had been issued to cover that leg of the journey. *See id.* at 700. Subsequent courts have speculated that the dictum may even have been a typographical error. *See Sompo Japan Ins. Co. v. Union Pac. R.R. Co.*, 456 F.3d 54, 62-63 (2d Cir. 2006) (citing *Canon USA, Inc. v. Nippon Liner Sys., Ltd.*, 1994 AMC 348 (N.D. Ill. 1992)). Four courts of appeals nonetheless followed the Eleventh Circuit's dictum while ignoring the statutory text.[9] Indeed, most of those opinions contain

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[9] *See Altadis USA, Inc. v. Sea Star Line, LLC*, 458 F.3d 1288, 1292-93 (11th Cir. 2006), *cert. dismissed*, 549 U.S. 1189 (2007); *American Road Serv. Co. v. Consolidated Rail Corp.*, 348 F.3d 565, 568 (6th Cir. 2003); *Shao v. Link Cargo (Taiwan) Ltd.*, 986

no reasoning at all, simply citing either the *Swift Textiles* dictum or cases relying on it.

In its detailed *Sompo* opinion, the Second Circuit fully exposes the fallacy of the separate-bill-of-lading requirement. *See* 456 F.3d at 61-63. Academic commentary similarly recognizes the correct rule. *See, e.g.*, 1 THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 10-4, at 598 (4th ed. 2004) ("the correct rule . . . is that the Carmack Amendment applies to the inland leg of an overseas shipment conducted under a single bill of lading to the extent that the shipment runs beyond the dominion of COGSA and the Harter Act"); Michael F. Sturley, *Maritime Cases About Train Wrecks: Applying Maritime Law to the Inland Damage of Ocean Cargo*, 40 J. MAR. L. & COM. 1, 8-26 (2009) [hereinafter *Train Wrecks*] (explaining in detail why separate-bill-of-lading requirement is erroneous).[10] In view of those analyses — and petitioners' virtual abandonment of the separate-bill-of-lading argument since this Court granted certiorari[11]

F.2d 700, 703 (4th Cir. 1993); *Capitol Converting Equip., Inc. v. LEP Transp., Inc.*, 965 F.2d 391, 394-95 (7th Cir. 1992).

[10] Professor Sturley's views are entitled to significant weight. Not only is he a leading scholar who also has represented both shippers and carriers before this Court, but he served as the senior adviser to the U.S. delegation that negotiated the Rotterdam Rules. Petitioners' challenge to his credibility at the certiorari stage is baseless and overlooks the many cases in which he represented carriers. Indeed, notwithstanding his representation of the losing party in *Kirby*, Professor Sturley subsequently expressed his agreement as an academic with *Kirby*'s uniformity principle. *See* Sturley, *Train Wrecks*, 40 J. MAR. L. & COM. at 1 n.aa1, 21.

[11] Because petitioners have virtually abandoned the principal argument on which they persuaded this Court to grant certiorari, the Court may wish to consider dismissing the petition as improvidently granted.

— the argument has no merit and should be rejected by this Court.

C. Superseded Statutory Language — Which Arguably Limited The Applicability Of The Carmack Amendment In International Trade To Exports To Adjacent Foreign Countries — Does Not Alter The Plain Meaning Of The Current Statute

1. Petitioners' present effort to avoid the statutory regime imposed by Congress invites this Court to apply neither the current language of the statute nor even the language of the predecessor statute in force immediately before the most recent enactment of the Carmack Amendment in 1995. Rather, petitioners seek re-adoption by judicial fiat of statutory language last in force during the Carter Administration and amended twice in the last three decades. In making that highly unconventional argument, they rely primarily on the presumption that a recodification statute does not work a substantive change to existing law absent a clear indication of congressional intent to change the law. *See* U.P. Br. 22 (citing *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 227 (1957)); K-Line Br. 47 (citing *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 136 (2008) (citing *Fourco Glass*, 353 U.S. at 227)).

Like any presumption, however, that principle can apply only to clarify an otherwise ambiguous law. No judicial presumption could override the unambiguous language of an Act of Congress, as exists here. In any event, Congress clearly expressed its intent to apply the Carmack Amendment without regard to the limitations advocated by petitioners by repealing the statutory language on which they rely and enact-

ing new language that cannot plausibly support an interpretation exempting them from coverage.

Petitioners advocate an untenable interpretive approach. Neither petitioner argues for interpreting the text differently from the plain meaning adopted by the court below.[12] Instead, they invite the Court to look behind the current text to see what the predecessor statute said before the current language was enacted 15 years ago. And, when that language just as clearly conflicts with the result petitioners seek, they invite the Court to go back yet again to discern the meaning of a statute in force another 17 years earlier. Only then — when petitioners finally find a statutory text in accord with their litigation objective — do they finally ask the Court to consider its meaning.

Contrary to Union Pacific's assertion (at 21), such an interpretation of codification bills is not "useful." Rather, codification laws will be of no use if their plain language has no operative legal effect. Under Union Pacific's approach, everyone affected by U.S. law must maintain a library of prior, superseded

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[12] Indeed, neither petitioners nor their *amici* cite any case in which any court has ever construed the current statute — even with the assistance of the *Fourco Glass* presumption — to deny Carmack coverage on the grounds that the shipment at issue involved an import from a foreign country or trade with a non-adjacent foreign country. Respondents have been unable to discover any such case. Numerous cases applied the Carmack Amendment to the inland leg of a shipment from a non-adjacent foreign country — including the principal case on which petitioners relied at the certiorari stage. *See Swift Textiles*, 799 F.2d at 700 (applying Carmack Amendment to inland leg of shipment from Switzerland); *see also, e.g., Sompo*, 456 F.3d at 56, 76 (Japan); *Neptune Orient Lines*, 213 F.3d at 1119 (Indonesia); *cf., e.g., Project Hope v. M/V Ibn Sina*, 250 F.3d 67, 73-75 (2d Cir. 2001) (shipment to Egypt).

statutes just in case a current statute might mean not what it plainly says but rather what some long-since repealed predecessor statute once said. Given the many revisions to longstanding statutes, such an approach would produce interpretive chaos. No one would ever know whether to rely on the current statute or to spend hours searching through superseded legislation for a predecessor provision that might have a different meaning.[13] Petitioners would set the law on its head by using the *Fourco Glass* presumption to contradict the plain meaning of an otherwise unambiguous statute by reference to a prior ambiguous text.[14]

Respondents do not question the applicability of the *Fourco Glass* presumption in its proper place. When recodification language is ambiguous and might arguably bear more than one meaning, a court

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[13] Petitioners' reliance on repealed predecessor statutes is not limited to the recodification context. The current version of the Carmack Amendment was enacted in the ICCTA, which was not a recodification statute.

[14] Petitioners go to great lengths to mask the ambiguities in the pre-1978 understanding of the predecessor statute by their efforts to distinguish *Galveston, Harrisburg & San Antonio Railway Co. v. Woodbury*, 254 U.S. 357 (1920). *See* U.P. Br. 25-33; K-Line Br. 44-46. Although they attempt to dismiss Justice Brandeis's reasoning in *Galveston* as addressing the Act's jurisdictional provision rather than the Carmack Amendment's scope provision, the jurisdictional provision at issue there was a predecessor to the current 49 U.S.C. § 10501 — the provision that now determines the geographical scope of the Carmack Amendment. This Court's decision in *Union Pacific R.R. Co. v. Burke*, 255 U.S. 317 (1921), further illustrates those ambiguities. There, this Court applied the Carmack Amendment to the inland leg of a multimodal shipment from (non-adjacent) Japan under a through bill of lading. Neither petitioner addresses *Burke*.

appropriately might look back to the prior law to see if it supports one of the current law's plausible meanings. The presumption offers a tool for using an older, but clearer, statute to help construe a more recent but ambiguous recodification. Here, by contrast, the lower court's interpretation of § 11706(a) and § 10501(a) is unarguably correct. Petitioners offer no plausible contrary argument in their principal briefs — and their reply briefs will be too late to do so.

2. Petitioners offer several legal sources to prop up their *Fourco Glass* argument, but none provides the requisite support. *First*, the cases petitioners cite are readily distinguishable. In every one, the governing statute was at least ambiguous. In at least some (perhaps all) of those cases, this Court used the presumption simply to reinforce the majority's conclusion of the more natural reading of the current statute. At the very least, in every case the party advocating application of the *Fourco Glass* presumption made a strong textual argument supporting a plausible reading of the recodified statute that was consistent with the prior law.

Consider, for example, *Cass v. United States*, 417 U.S. 72, 81-82 (1974), which petitioners treat as the strongest support for their argument. *See* U.P. Br. 22-23 (discussing *Cass* Court's invocation of *Fourco Glass* presumption without discussing its application in any other case); *cf.* K-Line Br. 47 (citing presumption but not discussing its application in any case). Union Pacific seeks to leave the impression that the *Cass* Court ignored the plain meaning of 10 U.S.C. § 687(a) (1970), the statute then at issue, to apply the presumption instead. *See* U.P. Br. 22-23. The opinion flatly contradicts that view, finding it "[o]bvious[]" that "there is room for reasonable

dispute over the construction of § 687(a) based on the statutory language alone." 417 U.S. at 77 n.5. Indeed, the government's principal argument in *Cass* for construing § 687(a) consistently with the predecessor statutes was "that the language of the statute shows that Congress intended" that result. Brief for the Respondents at 8, *Cass*, No. 73-604 (U.S. filed Apr. 9, 1974). A detailed textual analysis of § 687(a), *see id.* at 9-10, confirmed by the plain language of related statutory provisions, *see id.* at 11-12, demonstrated Congress's intended meaning. The government's secondary argument rested on the administrative interpretation of the agencies administering the provision, *see id.* at 12-13, which was "consistent with . . . the language of the statute," *id.* at 13. The third element of the government's argument was legislative history, and the *Fourco Glass* presumption was mentioned in a single paragraph at the end of that argument. *See id.* at 22-23.

Petitioners cite no case in which this Court applied the *Fourco Glass* presumption to contradict the plain meaning of an unambiguous statute, and respondents are aware of no such case. Indeed, any such judicial presumption could not overrule a statute's plain meaning without creating serious separation-of-powers issues.

Second, petitioners rely on a provision in the 1978 recodification that instructed courts to interpret that recodification consistently with prior law. *See* Act of Oct. 13, 1978, Pub. L. No. 95-473, § 3(a), 92 Stat. 1337, 1466. That provision applied to statutory language in force from 1978 to 1995 — well before the events at issue here. It was repealed in 1995, when the current Carmack Amendment was enacted in the

ICCTA.[15] Congress did not include language comparable to § 3(a) in the 1995 statute, which was not a recodification.

Even if § 3(a) of the 1978 recodification were still in force, it could not sustain the heavy burden petitioners place on it. At most, such a general provision would have informed the interpretation of an otherwise ambiguous provision elsewhere in the same enactment, but could not have overruled the unambiguous plain language of the specific provisions that govern here. Section 3(a) would have operated simply as a statutory version of the judicial *Fourco Glass* presumption. When a recodified provision of the statute is ambiguous, § 3(a) simply instructs courts to do what they already do under the *Fourco Glass* presumption.

When a recodified provision of the statute is unambiguous, on the other hand, as § 11706(a) and § 10501(a) are here, a reviewing court would properly harmonize a provision like § 3(a) with the unambiguous language it is construing by giving effect to both provisions. *See, e.g., Carcieri v. Salazar*, 129 S. Ct. 1058, 1066 (2009) ("'[W]e are obliged to give effect, if possible, to every word Congress used.'") (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979)). Because an interpretive statutory command designed for ambiguous language has no role to play in the construction of *unambiguous* language, the plain meaning of the unambiguous provision controls.

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[15] The Carmack Amendment was substantially revised in 1995. Immediately prior to that reenactment, for example, it was a single provision governing both rail and motor carriers. *See* 49 U.S.C. § 11707 (Supp. II 1978). It is now two provisions, one governing railroads and the other motor carriers. *See supra* note 6 and accompanying text.

Widely recognized canons of statutory construction support the principle that a more specific provision governing the precise issue at hand (the applicability of the Carmack Amendment) trumps a more general provision offering guidance across the entire recodification. *See, e.g., National Cable & Telecomms. Ass'n, Inc. v. Gulf Power Co.*, 534 U.S. 327, 335 (2002) ("[S]pecific statutory language should control more general language when there is a conflict between the two.").

D. COGSA § 7 Does Not Displace The Carmack Amendment's Application

Petitioner K-Line argues that the Carmack Amendment's application to the rail transportation at issue here would somehow conflict with COGSA § 7. *See* K-Line Br. 33-36; *cf.* U.P. Br. 36 (suggesting "that Congress believed parties could use" COGSA § 7). That argument ignores the plain language (and intended purpose) of at least three COGSA provisions: COGSA does not apply to inland carriage (§ 1(e)), and nothing in COGSA overcomes (or permits private parties to overcome) the mandatory application of the Carmack Amendment (§§ 7, 12).

By its plain terms, § 7 simply preserves the freedom to apply COGSA (or any other liability regime) as a *matter of contract* to those portions of a multimodal shipment that are outside the statutory scope of COGSA, but only if no other mandatory law applies. As *Kirby* recognized, COGSA by its terms applies with statutory force only "'from the time when the goods are loaded on to the time when they are discharged from the ship.'" 543 U.S. at 29 (quoting COGSA § 1(e)). For the portion of a shipment outside of that period, when COGSA does not apply of its own force, § 7 declares that "[n]othing con-

tained in this Act shall prevent" the parties from agreeing on liability rules of their choice. The chosen rules might be embodied in COGSA, some other widely recognized liability regime, or (as is most frequently the case) unique rules that the carrier has drafted for its own protection. Section 7 declares nothing more than the truism that "[n]othing contained in [COGSA]" restricts the parties' freedom during periods when COGSA does not apply.[16] It does not address whether other mandatory law applying to inland carriage restricts the parties' freedom.

By contrast, § 12 directly speaks to whether COGSA addresses mandatory law for inland carriage. In full, § 12 provides:

> Nothing in this Act shall be construed as superseding any part of the [Harter Act, 46 U.S.C. §§ 30701-30707], or of *any other law which would be applicable in the absence of this Act*, insofar as they relate to the duties, responsibilities, and liabilities of the ship or carrier prior to the time when the goods are loaded on or after the time they are discharged from the ship.

COGSA § 12 (emphasis added). Because the Carmack Amendment is "applicable in the absence of

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[16] Section 7 provides in full:

> Nothing contained in this Act shall prevent a carrier or a shipper from entering into any agreement, stipulation, condition, reservation, or exemption as to the responsibility and liability of the carrier or the ship for the loss or damage to or in connection with the custody and care and handling of goods prior to the loading on and subsequent to the discharge from the ship on which the goods are carried by sea.

COGSA § 7.

[COGSA]," nothing in COGSA "supersed[es] any part of" it with respect to the carrier's liability before loading or after discharge from the ship, including during inland carriage. Notably, K-Line has nothing to say about COGSA § 12.

K-Line asserts incorrectly (at 36) that Congress "paid conscious heed" to COGSA § 7 with the intent that COGSA would displace the Carmack Amendment during inland transportation. Section 7 is nothing more than the U.S. enactment of article 7 of the Hague Rules, the international treaty on which COGSA was based. *See Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 537 (1995); *Robert C. Herd & Co. v. Krawill Mach. Corp.*, 359 U.S. 297, 301 (1959). The only attention that Congress paid to § 7 was to ensure that it would not displace existing U.S. law (such as the Carmack Amendment). *See* Michael F. Sturley, *Freedom of Contract and the Ironic Story of Section 7 of the Carriage of Goods by Sea Act*, 4 BENEDICT'S MAR. BULL. 201, 206-07 (2006) (detailing the history of § 7's enactment). Section 12, on the other hand, is a unique U.S. provision with no counterpart in the Hague Rules. Accordingly, it was the provision to which Congress "paid conscious heed." *Id.* Indeed, Congress was told that "[§ 12] renders [§ 7] largely if not wholly inoperative insofar as concerns the United States." *Carriage of Goods by Sea: Hearing on S. 1152 Before the S. Comm. on Commerce*, 74th Cong. 32 (1935) (memorandum of U.S. Chamber of Commerce).

E. Applying The Carmack Amendment's Plain Language To Govern The Inland Leg Of A Multimodal Shipment Best Accomplishes The Uniformity Goals This Court Recognized In *Kirby*

Petitioners and their *amici* argue that rejecting the Carmack Amendment's application to the inland leg of a multimodal shipment would best achieve the benefits of uniformity recognized by this Court in *Kirby*. Thus, Union Pacific predicts that reversal of the decision below would yield "uniform, consistent . . . rules governing both the ocean and inland legs" and "uniform terms governing an entire [multi]modal shipment." U.P. Br. 36; *see also, e.g.*, K-Line Br. 36 (unfettered freedom of contract "permits uniform rules to govern all phases of international through shipments"); *id.* at 37 (applying Carmack Amendment "would eliminate . . . uniformity"); AAR Br. 14 (promising "uniform terms that apply to the entire shipment").

In fact, the best way to promote uniformity in this context is to respect Congress's policy and apply the Carmack Amendment uniformly to virtually all long-haul rail transportation in this country, including the inland leg of a multimodal import shipment. As the government (at 5, 27-29) and petitioners' *amicus* International Group (at 26) recognize, Congress passed the Carmack Amendment to provide uniform national liability rules, *see Adams Express*, 226 U.S. at 505-06, thus displacing the state liability rules that had applied before then, *see Pennsylvania R.R.*, 191 U.S. at 491. Applying the Carmack Amendment in cases such as this one ensures that virtually[17] all

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[17] Purely intrastate cargo, which is not a significant concern, is outside the Carmack Amendment's scope.

of a particular train's cargo will be subject to the same liability rules if a catastrophic accident, such as a major derailment, occurs. If the Carmack Amendment were held *not* to apply here, then different liability regimes would govern domestic shipments (including multimodal shipments involving ocean carriage from Hawaii, Alaska, Puerto Rico, and other territories) and international shipments — even though the same trains carry both types of shipments.[18]

Moreover, different liability regimes would apply to different international shipments depending on the terms of the multimodal bills of lading under which each is carried. Consider, for example, the underlying choice-of-forum issue in these cases. Under petitioners' theory, shippers of domestic cargo would receive the benefit enacted by Congress in § 11706(d). They would be permitted to resolve their claims in a convenient U.S. forum. Cargo interests subject to K-Line's bill of lading, on the other hand, would lose § 11706(d)'s protection and be forced to bring their claims in Japan (if their claims are large enough to justify the added expense). If cargo carried under a bill of lading issued by COSCO (a Chinese ocean carrier) were damaged in the same derailment, however, those claimants would be forced to sue in China. *See Jewel Seafoods Ltd. v. M/V Peace River*, 39 F. Supp. 2d 628, 629-30 (D.S.C. 1999) (describing COSCO bill

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[18] As Union Pacific admits, under petitioners' theory, two containers on identical journeys would be subject to different legal regimes based on the documentation that was used. If a new domestic bill of lading had been issued for one of the containers imported on one of the K-Line ships involved in these cases, that container would have been treated as a domestic shipment subject to the Carmack regime. *See* U.P. Br. 44-45.

of lading with Chinese forum clause). And, when Cho Yang was the ocear carrier issuing the bills of lading, claims would have to be heard in Korea. *See Allianz Ins. Co. of Canada v. Cho Yang Shipping Co.*, 131 F. Supp. 2d 787, 789, 792 (E.D. Va. 2000) (Korean forum clause). For Hapag-Lloyd, the required forum would be in Germany. *See Jockey Int'l, Inc. v. M/V "Leverkusen Express"*, 217 F. Supp. 2d 447, 448, 456 (S.D.N.Y. 2002) (German forum clause). For Lauritzen Reefers, the required forum would be in England. *See Kelso Enters., Ltd. v. M/V Wisida Frost*, 8 F. Supp. 2d 1197, 1200-01 (C.D. Cal. 1998) (English forum clause). For Croatia Line, the required forum would be in Croatia. *See Pasztory v. Croatia Line*, 918 F. Supp. 961, 963 (E.D. Va. 1996) (Croatian forum clause). For Egypt Azov Shipping Co., the required forum would be in Egypt. *See Nippon Fire & Marine Ins. Co. v. M.V. Egasco Star*, 899 F. Supp. 164, 166, 167 (S.D.N.Y. 1995) (Egyptian forum clause), *aff'd*, Nos. 96-7441(L) & 96-7481(XAP), 1996 WL 614811 (2d Cir. Oct. 21, 1996) (judgment noted at 104 F.3d 351). And the list could go on for pages, particularly because non-vessel operating common carriers ("NVOCCs") also issue through bills of lading with different terms than ocean carriers. *See, e.g., Kirby*, 543 U.S. at 19, 21.

The net result under petitioners' theory is legal chaos. With more than 140 different shipping lines (not to mention countless NVOCCs) serving the port of Long Beach, and a typical train from Long Beach to the Midwest carrying literally hundreds of containers from a wide variety of ships,[19] any given train

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[19] *See* Port of Long Beach, Trade/Commerce, *at* http://www.polb.com/economics/default.asp (last visited Feb. 9, 2010). Although the four shipments at issue here were all under

may well carry cargo shipped under literally scores of different bills of lading, each with its own set of terms and forum provisions. Under petitioners' theory, responsibility for resolving the claims from a single derailment would be scattered among courts around the world — despite the fact that all the claims arose from a single incident, the same core evidence of the railroad's negligence would be relevant in every claim, and the principal defendant would be the same U.S. railroad in every case. The only possible explanation for such an absurd result would be the carriers' desire to make litigating their actions so impractical they avoid the consequences of their negligence. It most certainly does not produce the uniformity to which petitioners pay mere lip service. And it is impossible to believe that Congress intended that result.

To make matters worse, petitioners' theory would not even achieve the promised uniformity between the ocean leg and the inland leg on a single shipment. Although petitioners are quick to cite COGSA § 7 for authority to extend COGSA beyond the tackle-to-tackle period, *see, e.g.*, K-Line Br. 33, § 7 actually provides a limited freedom to apply any liability regime outside COGSA's reach. If the Carmack Amendment did not apply to the inland leg of a multimodal shipment, an ocean carrier could impose practically any liability rules it wishes for inland carriage.[20] Nothing would require a carrier to apply

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K-Line bills of lading, they were carried from China on three different ships.

[20] As a practical matter, it is more likely that railroads will require ocean carriers to impose broad non-liability rules for inland carriage in their multimodal bills of lading. Railroads already require ocean carriers to indemnify them from any lia-

COGSA (or one of the other international maritime regimes) to the inland leg. Unless the carrier voluntarily extends the same rules that apply to the ocean carriage to the inland leg, there will be no uniformity.[21]

The lack of uniformity even under a single contract is not an abstract concern. The *Altadis* case, for example, which this Court granted certiorari to decide, arose from a carrier's effort to impose a non-uniform liability term on the inland leg of a multimodal shipment — a term that not only differed from COGSA but was prohibited by COGSA. *See* Sturley, *Train Wrecks*, 40 J. MAR. L. & COM. at 21-22. Indeed, this Court need look no further than the K-Line bills of lading in these cases to see that petitioners' theory leads to less uniformity, not more. Petitioners do not in fact ask for "uniform terms governing an entire [multi]modal shipment" (U.P. Br. 36) or "uniform rules to govern all phases of international through shipments" (K-Line Br. 36). They ask this Court to enforce K-Line's bills of lading, which explicitly provide different (non-COGSA) terms for the inland

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bility that they may suffer as the result of the ocean carriers' failure to include the clauses necessary to protect the railroads from Carmack liability to the extent permissible under current law. *See, e.g.*, Paul Keane, *US Law — COGSA Limitations and Intermodal Transport*, 192 GARD NEWS 22, 24 (2008).

[21] Even if the carrier voluntarily extended the ocean regime to the U.S. inland leg, it is unlikely that the same regime would also apply to the inland leg at the other end of the ocean journey. Most other countries also have mandatory regimes governing inland carriage that are different from the ocean regime. Indeed, the K-Line bills of lading in these cases expressly provide different rules for U.S. and non-U.S. inland carriage. *Compare* clause 4(1) (JA 144) *with* clause 3(B)(1) (quoted *infra* p. 53). Thus, petitioners' theory could not result in a single liability regime governing the entire shipment.

leg of a multimodal shipment. Clause 23(3), for example, requires claims for inland damage to be filed "within 9 months after delivery of Goods or the date when Goods should have been delivered, failing which Carrier will be discharged of all liability therefor." JA147. The bills of lading do not purport to extend that requirement to ocean damages, *cf. id.* (clause 23(2)), and COGSA itself would in any event invalidate such an extension if K-Line had attempted it, *see* COGSA § 3(8) (invalidating any contractual provision "relieving the carrier or the ship from liability . . . or lessening such liability otherwise than as provided in this Act"); *Sky Reefer*, 515 U.S. at 535 (recognizing an effort to shorten the claimant's time to bring a claim as a violation of § 3(8)).

F. Applying The Carmack Amendment's Plain Language To Govern The Inland Leg Of A Multimodal Shipment Will Not Produce The Adverse Effects Imagined By Petitioners And Their *Amici*

To detract attention from the statute's plain language, petitioners and their *amici* imagine a parade of horribles predicted to ensue if this Court applies the Carmack Amendment according to its unambiguous terms. On one level, those arguments are completely misplaced. Petitioners in essence ask this Court to substitute its judgment for Congress's. Congress already has made the decision to regulate domestic rail carriage in a wide variety of contexts (including under a through bill of lading governing transportation "between a place in . . . the United States and a place in a foreign country"). This Court should decline the invitation to override Congress's choice. In any event, petitioners' policy arguments

against a plain reading of the statute have no factual basis.

1. Applying the Carmack Amendment to the inland leg of a multimodal shipment will not create any tension with the U.S. position in negotiating the Rotterdam Rules

As the government notes (at 11), the United States recently signed the U.N. Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (the "Rotterdam Rules"), U.N. Doc. A/RES/63/122 (Dec. 11, 2008). When it enters into force, the Convention will change the liability rules for multimodal shipments such as those at issue here. *Amicus* International Group argues (at 29-33) that the result below is in tension with the position that the U.S. delegation took in negotiating the Rotterdam Rules because the United States favored the broad application of a uniform maritime liability rule. That argument is baseless. The decision below is fully consistent with both the Rotterdam Rules and the United States' negotiating position.

Although the U.S. delegation did indeed favor the broad application of a uniform maritime liability rule to *maritime* performing and contracting parties, the International Group ignores an important exception: The United States expressly opposed the suggestion that the uniform maritime liability rule should apply to inland carriers, such as Union Pacific. *See, e.g.*, *Proposal of the United States of America on the Definition of "Maritime Performing Party"*, U.N. doc. no. A/CN.9/WG.III/WP.84, at ¶¶ 1-2 (Feb. 28, 2007). Indeed, in the very document that the International Group (at 30-31) quotes in support of its argument, the United States explained in detail that the new

convention should not change existing law with respect to railroads and other inland carriers:

> With regard to [non-maritime] performing parties, the Instrument should not create new causes of action or preempt existing causes of action. For example, the liability of an inland carrier (e.g., a trucker or a railroad) should be based on existing law. In some countries, this may be a regional unimodal convention such as CMR. In others, it may be a mandatory or nonmandatory domestic law governing inland carriage . . . .

Proposal by the United States of America, U.N. doc. no. A/CN.9/WG.III/WP.34, at ¶ 7 (Aug. 7, 2003).

Consistent with the U.S. position, the Rotterdam Rules provide that the liability of railroads and other non-maritime performing parties will be governed by the law that would otherwise apply, not by the uniform regime established under the Convention. *See, e.g., Report of Working Group III (Transport Law) on the Work of Its Nineteenth Session (New York, 16-27 April 2007)*, U.N. doc. no. A/CN.9/621, at ¶¶ 132-137, 144-145 (May 17, 2007); *cf.* Rotterdam Rules arts. 1(7), 19 (applying uniform regime to maritime performing parties). The decision below therefore is fully consistent with both the Rotterdam Rules and the United States' negotiating position.

By contrast, petitioners' position is directly contrary to both. Petitioners' claim is that respondents should be forced to litigate the consequences of a U.S. train derailment in Japan. Articles 66 and 67 of the Rotterdam Rules, however, would invalidate the choice-of-forum clause on which petitioners rely[22]

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[22] Article 67 of the Rotterdam Rules recognizes exclusive forum-selection clauses in limited circumstances that are not

and instead guarantee respondents' access to a convenient forum of their choice, including a court with jurisdiction over "the port where the goods are finally discharged from a ship" (art. 66(a)(iv)). The United States not only supported that position but was one of its strongest advocates. *See, e.g., Proposal by the United States of America Regarding the Inclusion of "Ports" in Draft Article 75 of the Draft Convention in the Chapter on Jurisdiction*, U.N. doc. no. A/CN.9/WG.III/WP.58 (Nov. 16, 2005); *Proposal by the United States of America*, U.N. doc. no. A/CN.9/WG.III/WP.34, at ¶¶ 30-32 (Aug. 7, 2003). Indeed, it is surprising that *amicus* overlooked such significant provisions. The International Group admittedly opposed the Rotterdam Rules' jurisdiction provisions during the UNCITRAL negotiations. *See, e.g., Comments and Proposals by the International Chamber of Shipping, BIMCO and the International Group of P&I Clubs on Topics on the Agenda for the 18th Session*, U.N. doc. no. A/CN.9/WG.III/WP.73, at ¶¶ 2-5 (Aug. 28, 2006). But *amicus*'s present counsel recently explained elsewhere that "[t]he Rotterdam Rules will restore to a great extent" the pre-*Sky Reefer* rule prohibiting forum-selection clauses in bills of lading. *See* Chester D. Hooper, *Forum Selection and Arbitration in the Draft Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, or The Definition of Fora Conveniens*

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applicable here. Even if K-Line's service contracts satisfied the safeguards required by article 67(1)(a)-(b), which they do not, that would at most permit enforcement of forum-selection clauses in those service contracts, not the Japan forum-selection clauses in the bills of lading. In any event, under article 67(2), neither clause (in the service contracts or the bills of lading) would bind third parties such as respondents.

Set Forth in the Rotterdam Rules, 44 TEX. INT'L L.J. 417, 422 (2009).

2. Applying the Carmack Amendment to the inland leg of a multimodal shipment will not disrupt settled expectations in the transportation industry

The transportation industry has been working with mandatory national law governing inland carriage for decades. The United States is unusual in allowing private parties to opt out of the national law governing inland carriage in certain circumstances; most countries' mandatory law is far stricter. For most of Europe and parts of Asia and North Africa, for example, regional conventions supply mandatory law for road and rail carriage. *See* Convention on the Contract for the International Carriage of Goods by Road (CMR), May 19, 1956, 399 U.N.T.S. 189; *Uniform Rules Concerning the Contract for International Carriage of Goods by Rail (CIM)*, Appendix B to the Convention Concerning International Carriage by Rail (COTIF), May 9, 1980, 1397 U.N.T.S. 2, 112, as amended by Protocol for the Modification of the Convention Concerning International Carriage by Rail (COTIF) of 9 May 1980, June 3, 1999 (CIM-COTIF) (*available as amended at* http://www.otif.org/fileadmin/user_upload/otif_verlinkte_files/07_veroeff/02_COTIF_99/RU-CIM-1999-e.PDF). The transportation industry has long been dealing with those inland regimes without difficulty.

Indeed, K-Line's bills of lading in this very case demonstrate not only that the industry can deal with mandatory law governing inland carriage but that K-Line and its subcontracting inland carriers are already doing so. Most specifically, clause 3(B)(1),

which governs inland carriage everywhere except the United States, provides:

> Carrier's responsibility, if any, for any loss or damage to Goods proven to have taken place during any period other than Water Carriage shall be governed by any relevant provisions contained in any applicable international convention or national law which provisions (a) cannot be departed from by private contract to the detriment of Merchant, and (b) would have applied if Merchant had made a separate and direct contract with Carrier in respect of the particular stage of Carriage during which the loss or damage occurred.

In other words, if the cargo at issue here had been damaged by the negligence of a European railroad (rather than a U.S. railroad), the bills of lading would have provided explicitly for the governing inland legal regime to apply. Because clause 3(B)(1) applies throughout the world except in the U.S. trade, K-Line's "settled expectations" litigation argument is inconsistent with its ordinary business practices.

Outside of the litigation context, even railroads are adamant that they prefer the Carmack Amendment to uniform maritime law. Throughout the negotiation of the Rotterdam Rules, the U.S. railroad industry argued vigorously that they prefer to retain the Carmack Amendment rather than having the new uniform regime extended to them. Early in the process, for example, petitioners' *amicus* AAR — an organization in which Union Pacific is one of the most powerful members — filed formal comments strongly opposing the suggested extension of uniform

maritime rules to govern the inland leg of an international multimodal shipment:

> The U.S. and Canadian railroad members of the AAR have serious concerns over the application of the Draft Instrument to rail transportation. There is already an existing and well established system in the U.S. and Canada which governs the liability of rail carriers for loss and damage to goods transported and the rights and obligations of both the rail carrier and the shipper. This system was promulgated by legislation . . . .

Comments on Behalf of the Association of American Railroads Relating to the Preliminary Draft Instrument on the Carriage of Goods by Sea in *Compilation of Replies to a Questionnaire on Door-to-Door Transport and Additional Comments by States and International Organizations on the Scope of the Draft Instrument*, U.N. doc. no. A/CN.9/WG.III/WP.28, at 32 (Jan. 31, 2003). A footnote clarified that the "existing and well established system" referred to the Carmack Amendment. *Id.* at 32 n.2. Indeed, the AAR described the Carmack Amendment, in the context of international multimodal shipments, as "the statute providing the underpinning upon which the system of liability for loss and damage to transported goods is based." *Id.* at 33 n.3. In sum, the railroads consistently argued that they are governed by the Carmack Amendment and preferred to maintain that system. *See also* Sturley, *Train Wrecks*, 40 J. MAR. L. & COM. at 37-39.

II. PETITIONERS DID NOT VALIDLY CONTRACT AROUND THEIR OBLIGATIONS UNDER THE CARMACK AMENDMENT

Petitioners do not dispute that the forum-selection clauses requiring these cases to be brought in Japan violate the Carmack Amendment. But Union Pacific contends that, even if the Carmack Amendment applies to the rail transportation in these cases, the Japan forum-selection clauses can be enforced because it validly contracted around the Carmack Amendment's venue requirements. In so arguing, it relies on two statutory provisions, 49 U.S.C. § 10709 and § 10502(e). The former is inapplicable, and petitioners did not comply with the latter's requirements.

A. Section 10709 Does Not Apply To The Exempt Transportation At Issue Here

1. Congress set forth different statutory approaches to rail carrier liability for losses or damage to cargo

Three statutory provisions bear on rail carriers' obligation to offer shippers particular terms for liability and claims. First, the Carmack Amendment itself makes rail carriers liable "for the actual loss or injury to the property." 49 U.S.C. § 11706(a). It allows carriers to "establish rates for transportation of property under which . . . the liability of the rail carrier for such property is limited to a value established by written declaration of the shipper or by a written agreement between the shipper and the carrier." *Id.* § 11706(c)(3)(A). The Carmack Amendment also specifies the venues in which a suit to recover for property damage may be brought:

> (i) against the originating rail carrier, in the judicial district in which the point of origin is located;

> (ii) against the delivering rail carrier, in the judicial district in which the principal place of business of the person bringing the action is located if the delivering carrier operates a railroad or a route through such judicial district, or in the judicial district in which the point of destination is located; and
>
> (iii) against the carrier alleged to have caused the loss or damage, in the judicial district in which such loss or damage is alleged to have occurred.

Id. § 11706(d)(2)(A).

Second, 49 U.S.C. § 10502 permits the STB to exempt persons or services from most rail regulation. But it forbids the Board from issuing an order that "operate[s] to relieve any rail carrier from an obligation to provide contractual terms for liability and claims which are consistent with the provisions of section 11706 of this title" — *i.e.*, the Carmack Amendment's provisions imposing statutory liability on rail carriers for actual loss or injury to property and providing for enforcement of that liability. *Id.* § 10502(e).[23] Section 10502(e) further provides that nothing in the Carmack Amendment "shall prevent rail carriers from offering alternative terms." *Id.* That language has been interpreted to permit a carrier to contract around the Carmack Amendment's requirements, so long as it first provides the shipper with an opportunity to select terms that comply with Carmack. *See* Pet. App. 28a; U.S. Br. 30; *cf.* 49 U.S.C. § 11706(c)(3); *New York, N.H. & H. R.R. Co. v. Nothnagle*, 346 U.S. 128, 135 (1953) (applying the

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[23] A similar provision exists for motor carriers. *See* 49 U.S.C. § 13541.

provision of the Carmack Amendment now found in § 11706(c)(3)).

Third, § 10709 provides a different approach, by authorizing rail carriers to "enter into a contract with one or more purchasers of rail services to provide specified services under specified rates and conditions." *Id.* § 10709(a). Parties to a § 10709 contract "shall have no duty in connection with services provided under such contract other than those duties specified by the terms of the contract." *Id.* § 10709(b). Exercising its exemption authority under § 10502, the STB has exempted rail transportation as part of multimodal shipments (such as the transportation involved in these cases) from the provisions of subtitle IV of Title 49. That STB exemption includes § 10709. *See* 49 C.F.R. § 1090.2. Transportation that is exempt from § 10709 cannot be the subject of a contract under that provision. *See* U.S. Br. 30-32; Pet. App. 32a-33a.

In those three ways, a rail carrier must address the issue of its negligent loss or damage to cargo. The Carmack Amendment imposes liability by statute under § 11706(a), absent specific contractual treatment. If the STB exempts a rail carrier from the normal common-carrier obligations, the carrier and shipper may contract around the Carmack Amendment, if the carrier first offers terms consistent with § 11706 and the shipper elects alternative terms. *See id.* § 10502. And, finally, under a third approach to liability issues, a rail carrier providing non-exempt transportation may enter into a contract with purchasers of rail service under § 10709(a) to provide services under specified conditions.

2. The statutory history illuminates the separate functions of § 10502 and § 10709

Throughout much of the twentieth century, the federal government closely regulated rail transportation. The ICA required carriers to declare their rates in tariffs filed with the ICC, which had the power to review those rates for reasonableness and to ensure that carriers did not discriminate among shippers.

Before the Carmack Amendment, carriers routinely compelled a shipper "to make with each carrier in the route over which his package must go a separate agreement limiting the carrier liability of each separate company to its own part of the through route." *Atlantic Coast Line*, 219 U.S. at 199-200. If the shipment was damaged, the shipper was forced to pursue separate actions against each carrier. By enacting the Carmack Amendment in 1906, Congress made carriers liable for the full value of any damage to the property they transport. *See* 49 U.S.C. § 11706(a).

The Carmack Amendment also relieved shippers of the "difficult, and often impossible, task of determining on which of the several connecting lines the damage occurred." *Missouri, K. & T. Ry.*, 244 U.S. at 387; *see also Atlantic Coast Line*, 219 U.S. at 200 (identifying "[t]his burdensome situation of the shipping public" as the one that "Congress undertook to regulate"); 40 Cong. Rec. 9580 (1906) (statement of Rep. Richardson regarding conference committee's addition of Carmack Amendment to bill) (explaining that carriers have "a through-route connection" and "a settlement between them will be an easy matter, while the shipper would be at heavy expense in the institution of a suit"). Under the Carmack Amend-

ment, a shipper can bring an action against the receiving or delivering carrier for damages caused by any carrier over whose line or route the cargo is transported. *See* 49 U.S.C. § 11706(a).

In 1980, Congress largely deregulated the rail industry when it passed the Staggers Rail Act. As a general rule, carriers still must establish rates and terms that are available to all shippers upon request and subject to certain statutory and regulatory restrictions — that is, "common carrier" rates and terms. *See id.* § 11101(a), (e) (requiring rail carriers to provide transportation or service "on reasonable request" and "in accordance with the rates and service terms, and any changes thereto, as published or otherwise made available under subsection (b), (c), or (d)").

Congress created two ways for rail carriers to provide service on other rates and terms and without those restrictions. First, a carrier providing non-exempt transportation may contract with a shipper to do so. *See id.* § 10709(a) (authorizing rail carriers to "enter into a contract with one or more purchasers of rail services to provide specified services under specified rates and conditions"). If the shipper agrees to a contract under § 10709, the carrier is relieved of all duties other than those specified in the contract. *See id.* § 10709(b) ("A party to a contract entered into under this section shall have no duty in connection with services provided under such contract other than those duties specified by the terms of the contract."). If the shipper does not agree, it may obtain service on the common-carrier rates and terms, *including* terms that comply with the Carmack Amendment's provisions. *See id.* § 10709(f) ("A rail carrier that enters into a contract as authorized by

this section remains subject to the common carrier obligation set forth in section 11101, with respect to rail transportation not provided under such a contract."); H.R. Conf. Rep. No. 96-1430, at 100 (1980) ("Shippers who do not elect to enter into contracts, or are unable to do so, are assured that carriers will have the same common carrier obligations as in existing law."), *reprinted in* 1980 U.S.C.C.A.N. 3978, 4110, 4132. Thus, a shipper offered a § 10709 contract always has the option to choose the Carmack Amendment's statutory terms (and other common-carrier protections). *See* U.S. Br. 31-32.

Second, apart from § 10709, Congress gave the STB — as successor to the ICC — broad authority to exempt whole classes of transportation from some or almost all of the statutory obligations imposed on carriers. *See* 49 U.S.C. § 10502(a) (directing Board to exempt persons, classes of persons, and transactions from regulation that is "not necessary to carry out the transportation policy of section 10101 of this title" if the transaction is "of limited scope" or regulation is "not needed to protect shippers from the abuse of market power"). Shipments exempted from regulation under § 10502 are not eligible for common-carrier service, so shippers and carriers must negotiate contractual rates and terms.

3. The STB has exempted multimodal transportation under its § 10502 authority

The Board has exercised its authority under § 10502 to exempt multimodal transportation such as the transportation at issue here from common-carrier regulations. Specifically, the Board has exempted "from the requirements of 49 U.S.C. subtitle IV," 49 C.F.R. § 1090.2 — that is, the statutes governing interstate transportation — "the transportation by

rail, in interstate or foreign commerce, of . . . [a]ny freight-laden intermodal container comparable in dimensions to a highway truck, trailer, or semitrailer and designed to be transported by more than one mode of transportation," *id.* § 1090.1(a)(4), when that transportation is "provided by a rail carrier . . . as part of a continuous intermodal freight movement," *id.* § 1090.2. Section 10709 is part of subtitle IV of Title 49 and is thus covered by the Board's exemption. Accordingly, rail carriers providing multimodal transportation need not comply with the common-carrier requirements of that subtitle, but also may not enter into contracts under § 10709.

Because the transportation at issue here was exempt from § 10709, petitioners could not enter into a contract under that provision, as the United States and the Ninth Circuit explained. U.S. Br. 31; Pet. App. 32a. The Board itself interprets the exemption that way. In a recent letter brief responding to the Second Circuit's request for its views, the Board explained that "the language of the . . . exemption regulations exempts rail carriers from section 10709"; therefore, "traffic covered by current agency exemptions under section 10502 cannot also be the subject of a section 10709 contract." STB Letter Br. at 4, *Mitsui Sumitomo Ins. Co. v. Evergreen Marine Corp.*, No. 08-5184-cv (2d Cir. filed Jan. 6, 2010); *see also id.* at 5 (agreeing "with the outcome reached by the Ninth Circuit in *Regal-Beloit*"). The Board's interpretation of the exemption is "controlling unless plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (internal quotation marks omitted). Here, its interpretation is wholly consistent with the regulation's plain terms.

Although the Board's exemption applies to § 10709, it does not exempt carriers from the Carmack Amendment. The STB limited the exemption expressly, in accordance with § 10502(e). *See* 49 C.F.R. § 1090.2; *see also* Clarification of Notice of Final Rule, *Carriers Involved in the Intermodal Movement of Containerized Freight*, 46 Fed. Reg. 32,257, 32,257 (June 22, 1981) (emphasizing that exemption "does not relieve the railroads from the provisions of [the Carmack Amendment], concerning their liability for loss and damage"). Thus, as the Ninth Circuit correctly recognized, and as the United States explains here, carriers providing exempt multimodal transportation must "offer Carmack protections before they can successfully contract for alternative terms." Pet. App. 32a-33a; *see* U.S. Br. 30 ("Under Section 10502(e), a rail carrier providing exempt transportation must offer the shipper the option of contractual terms for liability and claims consistent with Carmack . . . and may enter into a contract with different terms only if the shipper does not select that option."); *see also Sompo*, 456 F.3d at 60 (collecting cases); *Tokio Marine & Fire Ins. Co. v. Amato Motors, Inc.*, 996 F.2d 874, 879 (7th Cir. 1993); *American Trucking Ass'ns, Inc. v. ICC*, 656 F.2d 1115, 1124 (5th Cir. Unit A Sept. 1981).

4. Union Pacific's proffered reasons for applying § 10709 to exempt transportation are unpersuasive

a. Union Pacific first insists (at 42-43) that exempt transportation remains subject to the STB's jurisdiction and therefore is eligible for a § 10709 contract. It relies on § 10709(a), which authorizes contracts by "rail carriers providing transportation subject to the jurisdiction of the Board." But the

existence of Board jurisdiction is beside the point, because the Board has exempted multimodal transportation from § 10709. Union Pacific cannot rely on the general reference to STB jurisdiction in § 10709(a) to negate a statutorily authorized regulation rendering that entire section inapplicable.

Union Pacific attempts to obfuscate the clear language of § 10502 and the Board's exemption regulation by caricaturing (and then attacking) the Ninth Circuit's opinion. It claims that the court "held" that exempt shipments are permanently removed from the Board's statutory jurisdiction. *See* U.P. Br. 42. Union Pacific fails to quote or cite specific language anywhere in the Ninth Circuit's opinion for that supposed "holding"; in fact, the court held no such thing. Instead, it explained that "[t]he Board's exemption removed [multimodal] transportation 'from the requirements of 49 U.S.C. subtitle IV,'" which "includes § 10709." Pet. App. 32a. The court accordingly held that "a carrier providing nonexempt transportation may contract under § 10709 without offering Carmack protections, but a carrier providing exempt transportation must proceed under § 10502, which does require such an offer." *Id.* at 32a-33a. Union Pacific's argument that the Board cannot abrogate its statutory jurisdiction is therefore a non sequitur. The Board plainly has authority to exempt transportation from statutory provisions, including § 10709. *See* 49 U.S.C. § 10502(a). When it has done so, as it has here, that exempt transportation cannot be the subject of a § 10709 contract.

b. Union Pacific also argues that its proposed construction of § 10709, under which carriers could contract around the obligation to offer Carmack-compliant terms, would not, as the Ninth Circuit

found, strip § 10502(e) of any meaning. *See* Pet. App. 31a-32a. Union Pacific speculates that § 10502(e) only "states a limit on the legal effect of an STB exemption order," without limiting "the contractual freedom of the shipping parties." U.P. Br. 43.

The statute refutes that contention, however. Section 10502 refers to a carrier's "*obligation* to provide contractual terms for liability and claims which are consistent with" the Carmack Amendment. 49 U.S.C. § 10502(e) (emphasis added). As that statutory language reflects, the default regime is the Carmack Amendment, not unregulated "contractual freedom." Congress also provided that, notwithstanding the Board's lack of authority to exempt carriage from the Carmack Amendment, carriers would still be permitted to "offer[] alternative terms" to shippers of exempt transportation. *Id.* That language makes sense only if the carrier's preferred terms are an *alternative* to Carmack-compliant terms. If the only terms offered are non-Carmack terms, those terms are not an "alternative" to anything.

Furthermore, Union Pacific's proposition conflicts with § 10502(e)'s purpose. The statute aims to ensure that, like shippers of nonexempt (regulated) transportation, shippers of exempt (unregulated) transportation have an opportunity to select Carmack Amendment protections before agreeing to alternative terms. *See* U.S. Br. 31-32 (elaborating on "important policy considerations" that "STB's interpretation . . . advances"). Union Pacific's reading of § 10709 would undermine Congress's intent by depriving shippers in exempt carriage situations of that guarantee and allowing carriers to force shippers into limited liability and claims terms without offering

them any opportunity to select Carmack Amendment protections. As one court opined:

> It would be nonsensical for (1) § 10502 to permit a certain category of rail contracts to offer specific rates and terms but require an initial offer of full Carmack liability and (2) § 10709 to permit the *same category of rail contracts* to offer specific rates and terms with no such requirement of an initial offer of full Carmack liability.

Sompo Japan Ins. Co. v. Norfolk S. Ry. Co., 540 F. Supp. 2d 486, 499 (S.D.N.Y. 2008), *quoted in* Pet. App. 31a-32a and U.S. Br. 32.

c. Finally, Union Pacific's argument also misapprehends the functional differences between § 10502(e) and § 10709. As the United States explains, "Section 10502(e) specifies contractual terms that the carrier must offer before a contract for carriage is made, whereas Section 10709 specifies the effect of such a contract after it has been executed." U.S. Br. 30. Put differently, under the Carmack Amendment and § 10502(e), a transportation contract inconsistent with Carmack is not valid if the carrier did not first offer the shipper Carmack-compliant terms. Section 10709 does not relieve carriers from the obligation to offer Carmack-compliant terms before contracting; instead, it establishes the rights and duties of parties under valid contracts that already have been made. In effect, Union Pacific's position is that carriers can avoid a statutory precondition for contractual validity by employing special terms in the contract itself. Nothing in the statute supports such an illogical interpretation. And the history of the provision offers no support for the notion that railroads — whose contractual abuses had led to the Carmack Amendment in the first place — could use

their contractual power to avoid the statutory preconditions for their exercise of those contractual rights.

In sum, nothing in § 10709 relieved petitioners of the obligation under the Carmack Amendment and § 10502(e) to offer respondents terms for liability and claims that were consistent with § 11706's basic liability and terms regime.

B. Petitioners Failed To Offer The Shippers Carmack-Compliant Terms Under § 10502(e)

1. Petitioners were required to offer the shippers a fair opportunity to select a forum specified by the Carmack Amendment

Section 10502(e) prohibits the STB from issuing an exemption order that "operate[s] to relieve any rail carrier from an obligation to provide contractual terms for liability and claims which are consistent with the provisions of section 11706," *i.e.*, the Carmack Amendment. 49 U.S.C. § 10502(e). That section also permits, however, carriers providing exempt transportation to "offer[] alternative terms," *id.*, and thereby to provide alternative provisions by contract other than the Carmack Amendment's specific terms.

To comply with § 10502(e), petitioners were required to offer *the shippers* contract terms for liability and claims that were consistent with the Carmack Amendment. *See* Pet. App. 32a; *Sompo*, 456 F.3d at 75; *supra* p. 62 (collecting authorities). In an analogous case, this Court articulated the applicable standard. In *Nothnagle*, a railroad sought to limit its liability for losing baggage that a passenger had checked through the carrier's redcap service. *See* 346 U.S. at 129. The railroad relied on a provision in its filed tariff limiting liability for baggage handled

by redcaps to $25 unless the passenger declared a greater value in writing and paid an additional charge. *See id.* at 133-34. Although the Court found that the tariff properly spelled out a graduated rate scheme, it nonetheless held the railroad to full liability because the passenger was inadequately apprised of her rights under that rate schedule. *See id.* at 135-36. "[O]nly by granting its customers *a fair opportunity* to choose between higher or lower liability by paying a correspondingly greater or lesser charge can a carrier lawfully limit recovery to an amount less than the actual loss sustained." *Id.* (emphasis added). "Binding respondent by a limitation which she had no reasonable opportunity to discover would effectively deprive her of the requisite choice." *Id.* at 135-36.[24]

The courts of appeals have elaborated on the "fair opportunity" principle announced in *Nothnagle* and how it applies in the commercial context. They require carriers to show that the shipper was presented with a written agreement containing a space to enter the declared value of the shipment (and thereby select full-value liability terms) or clear instructions for how to do so through a separate document.[25] *See*,

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[24] The *Nothnagle* Court construed the provision of the Carmack Amendment now found in § 11706(c)(3)(A), which permits a rail carrier to "establish rates for transportation of property under which the liability of the rail carrier for such property is limited to a value established by written declaration of the shipper or by written agreement between the shipper and the carrier." 49 U.S.C. § 11706(c)(3)(A). There is no sound basis to construe § 10502(e)'s language preserving the ability to "offer[] alternative terms" differently. *Id.* § 10502(e).

[25] To be sure, what constitutes a "fair opportunity to choose" may vary with the sophistication of the shipper and its relation to the carrier. But the "fair opportunity" requirement ensures

e.g., *Sassy Doll Creations, Inc. v. Watkins Motor Lines, Inc.*, 331 F.3d 834, 842 (11th Cir. 2003); *Hollingsworth & Vose Co. v. A-P-A Transp. Corp.*, 158 F.3d 617, 621 (1st Cir. 1998); *Toledo Ticket Co. v. Roadway Express, Inc.*, 133 F.3d 439, 443 (6th Cir. 1998); *Hughes Aircraft Co. v. North Am. Van Lines, Inc.*, 970 F.2d 609, 612 (9th Cir. 1992); *Carmana Designs Ltd. v. North Am. Van Lines Inc.*, 943 F.2d 316, 321 (3d Cir. 1991); *Yamazen U.S.A., Inc. v. Chicago & Nw. Transp. Co.*, 790 F.2d 621, 623 (7th Cir. 1986).

Thus, for petitioners to establish that they gave the shippers a "fair opportunity" to select a forum for suit consistent with the Carmack Amendment's venue provisions, 49 U.S.C. § 11706(d), they must show something in the written agreements between the parties indicating that option was available and allowing the shippers to select it.

2. This Court should affirm the Ninth Circuit's remand for a determination whether petitioners complied with the fair opportunity requirement

The Ninth Circuit characterized the record on this issue as a "factual morass" and left the question to the district court on remand. Pet. App. 34a-35a & n.22. This Court should follow the same course. *See*,

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that § 10502(e)'s obligation to offer Carmack-compliant terms remains a meaningful one. *See, e.g.*, Pet. App. 31a n.20 (court of appeals "particularly troubled" by suggestion that carriers could satisfy § 10502(e) through language "buried within several layers of incorporated text, of which the shipper had no direct knowledge"); *Sompo*, 540 F. Supp. 2d at 500 (expressing concern that shippers might not be "on actual notice of either the [Intermodal Transportation Agreements] or the rail carrier circulars or have the opportunity to review them" and that there were "too many steps incorporated by reference to properly charge the shippers with notice of their terms").

e.g., *NCAA v. Smith*, 525 U.S. 459, 470 (1999) ("[W]e do not decide in the first instance issues not decided below."); *United States v. Bestfoods*, 524 U.S. 51, 72-73 (1998) ("Not only would we be deciding in the first instance an issue on which the trial and appellate courts did not focus, but the very fact that the District Court did not see the case as we do suggests that there may be still more to be known about [the relevant facts].").

The record here is unduly complicated for final resolution by this Court, and petitioners make no serious effort to clarify it in their briefs. At least three different agreements covered each of the shipments at issue in these cases; several provisions of those agreements set out conflicting requirements; and neither the interaction among the agreements nor the shippers' awareness of each of them is clear from the record. *See* Pet. App. 34a-35a & n.22. For instance, two of the agreements contain conflicting forum-selection clauses. Union Pacific's MITA provides for suit in Nebraska (JA134), whereas K-Line's bills of lading require disputes to be brought in Japan (JA155). The ERTA governing the relationship between Union Pacific and K-Line incorporated the MITA's provisions, but it is unclear whether the Nebraska forum-selection clause is part of that incorporation. *See* Pet. App. 34a n.22. Union Pacific claims the benefit of all provisions in the ERTA and the bills of lading, *see* U.P. Br. 46 n.10, but neither it nor any of the written agreements establish which provision governs if there is a conflict — as there may well be between the two forum-selection clauses. Although Union Pacific contends that those facts are "irrelevant," *id.*, whether § 10502(e) was satisfied depends on them, because the critical question is which

terms the shippers had a meaningful opportunity to select.

3. Petitioners failed to show any offer of Carmack-compliant terms to the shippers

If the Court reaches this issue, however, the existing record reveals no offer of Carmack-compliant terms to the shippers. Petitioners bear the burden of proving that they complied with that requirement. *See Hughes*, 970 F.2d at 612; *Carmana*, 943 F.2d at 319. They have not met their burden.

The Carmack Amendment provides for venue "in a district court of the United States or in a State court." 49 U.S.C. § 11706(d)(1).[26] That court must be located in a judicial district encompassing the point of origin, the plaintiff's principal place of business, the destination of the cargo, or the place where the cargo was damaged. *Id.* § 11706(d)(2)(A)(i)-(iii). Here, none of those locations is Japan. *See* Pet. App. 2a n.1.

Neither Union Pacific nor K-Line claims to have offered the shippers the choice of a forum-selection clause compliant with the Carmack Amendment's venue provisions (or a contract with no forum-selection clause). Indeed, Union Pacific cites no direct contact with any of the shippers at all. It purports to rely instead on terms it offered to K-Line.

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[26] This provision applies to "[a] civil action under [the Carmack Amendment]." 49 U.S.C. § 11706(d)(1). Courts have recognized that a suit by an exempt shipper, even one that accepted a carrier's offer of alternative terms, is a suit "under the Carmack Amendment" by virtue of § 10502(e). *Tokio Marine*, 996 F.2d at 879; *see also Schoenmann Produce Co. v. Burlington N. & S.F. Ry. Co.*, 420 F. Supp. 2d 757, 762 (S.D. Tex. 2006).

See U.P. Br. 44. For the reasons explained in Part II.B.4 below, that indirect offer is not enough.

For its part, K-Line offered shippers only the Japan forum-selection clause contained in its bills of lading, JA155, which is not consistent with the venue requirements established under the Carmack Amendment. Union Pacific points out that the bills of lading authorized K-Line to subcontract for inland carriage "on any terms whatsoever." U.P. Br. 49; *see* JA145. But that bare statement did not give shippers a "fair opportunity" to select the venue terms spelled out in § 11706(d). It does not mention venue (or the Carmack Amendment) at all, let alone provide meaningful instructions for how shippers can request the protections of that statute.

Because neither petitioner complied with the obligation contained in § 10502(e) to offer shippers a choice of Carmack-compliant venue terms, the Japan forum-selection clause in the bills of lading is unenforceable.

4. Union Pacific cannot meet its obligation under § 10502 through terms offered to K-Line

Union Pacific argues (at 44) that it satisfied the requirements of § 10502(e) by giving K-Line the opportunity to select Carmack Amendment protections. But providing that choice to the carrier with which the shippers contracted does not give the *shipper* a "fair opportunity" to make a deliberate choice as to whether it is willing to sacrifice Carmack Amendment protections for a more favorable carriage rate.

Union Pacific offers up a range of arguments purporting to justify its failure to comply with the Carmack Amendment and § 10502(e). First, it protests the supposed unfairness or unworkability of requir-

ing rail carriers to ensure that shippers of multimodal transportation are offered Carmack Amendment protections for cargo transported on Union Pacific trains in the United States, either directly or by the originating carrier. It asserts that, under *Kirby*, "a railroad is entitled to treat its direct counterparty as the shipper, and not look behind whether that counterparty is the original cargo owner or instead a shipping intermediary." U.P. Br. 46. It then claims that a contrary rule would be "completely impractical," because "[t]he railroad may have no idea who the ultimate shippers were, and no practical way to locate them." *Id.* at 48.

Union Pacific's arguments are unavailing. This Court long ago made clear that a railroad cannot avoid the requirements of the Carmack Amendment without first offering its protections *to the shipper*. In *Burke*, this Court considered a multimodal shipment under a through bill of lading. An ocean carrier transported cargo from Yokohama, Japan, to San Francisco, California, where it turned over the cargo for rail transportation to New York. While in the possession of Union Pacific, the cargo was destroyed in a train collision. *See* 255 U.S. at 318. In a suit brought by the shipper, Union Pacific sought to limit its liability to the value declared by the shipper in the through bill of lading. The Court held that it could not do so, because the shipper was never given an opportunity — by Union Pacific or the ocean carrier — to choose between a lower rate for carriage (with limited liability) and a higher rate (with full liability). *See id.* at 323 ("To allow the contention of the petitioner would permit carriers to contract for partial exemption from the results of their own negligence without giving to shippers any compensating

privilege."). The Court did not look to whether the railroad offered such a choice to the ocean carrier with whom it contracted. The question was only what choice the shipper had been given. *Burke* makes clear that the requisite offer of Carmack-compliant terms must be given to the shipper, not by the railroad to an intermediary.

Kirby does not conflict with *Burke*, because the Court in *Kirby* had no occasion to consider the requirements of the Carmack Amendment. No party argued that the Carmack Amendment applied. Thus, the Court did not address the effect of the Carmack Amendment on its holding that intermediaries act as agents of shippers "for a *single, limited* purpose." *Kirby*, 543 U.S. at 34.

Nor does *Kirby sub silentio* control these cases. The Court had no reason to consider the proper rule regarding forum-selection clauses and whether a negligent railroad in a U.S. train derailment in the United States could force a U.S. cargo interest to bring a claim in Japan for the railroad's damage to the cargo. The Court stressed that its decision was only about *liability* limitations. *See id.* Moreover, it based its selection of a rule for those liability limitations — which it characterized as "a close call," *id.* — on the potential for a contrary decision to produce higher rates and on the ability of shippers to recover damages from their intermediaries. *See id.* at 35. Neither rationale applies to forum-selection clauses. Union Pacific does not argue that it would have to charge higher rates to compensate for subjecting itself to suit in the particular U.S. forums specified in § 11706(d). Indeed, Union Pacific's own forum-selection clause provides for suit in the United States, not Japan. Nor could a right to sue K-Line

in Japan make the shippers whole for the inability to pursue relief against Union Pacific in the United States.

Union Pacific's effort to enforce a forum-selection clause that conflicts with its own demonstrates the inconsistency of its arguments in these cases. It initially argued that *New York* was the proper venue, *see supra* p. 16, and only later joined K-Line's motion for dismissal on the ground that Japan was the proper forum. *See* Pet. App. 36a. Further, at the same time as it seeks to enforce K-Line's bills of lading, Union Pacific claims it need not bear the burden of ensuring that the forum-selection clauses in those bills were validly obtained in compliance with § 10502(e)'s requirement that the carrier offer the shipper Carmack Amendment venue terms.

Union Pacific's hypocrisy does not end there. The railroad's basis for arguing that the Carmack Amendment does not apply here is that the underlying shipments moved only under the through bills of lading issued by K-Line and that the contracts between Union Pacific and K-Line are of no moment. *See* U.P. Br. 16, 32-34. But Union Pacific then argues that those Union Pacific/K-Line contracts are all that matter when the Court turns to consider whether there was a proper offer of Carmack Amendment terms. If the application of the Carmack Amendment turns solely on the K-Line through bills of lading, as Union Pacific insists, then the choice of Carmack Amendment terms also must be offered to the shippers under those K-Line bills. Yet those documents contain no support for the notion that the shippers received a choice of Carmack Amendment terms. Union Pacific cannot have it both ways.

Union Pacific offers the fallback position that it is "impractical" to burden it with the consequences of K-Line's failure to offer the shippers Carmack Amendment terms. That contention is neither germane nor compelling. To begin with, Union Pacific's complaint — which railroads have asserted unsuccessfully for more than a century — is properly directed to Congress, not this Court. Union Pacific states that it transports "containers that were sealed on the other side of the world and may contain goods aggregated for efficiency by intermediaries from many different cargo owners." U.P. Br. 48. It claims that it has no practical way of tracking down these multiple shippers. But Congress enacted the Carmack Amendment in response to the difficulty *shippers* faced in trying to determine which of the many rail carriers involved in a shipment damaged their cargo. *See Missouri, K. & T. Ry.*, 244 U.S. at 387; *Atlantic Coast Line*, 219 U.S. at 200. And Congress expressly chose to make *each carrier* — not only carriers in direct contact with the shipper but *any* carrier that transported the cargo — accountable under the Carmack Amendment for the cargo damage. *See* 49 U.S.C. § 11706(a). Thus, Congress determined that, as between a negligent carrier and a shipper of damaged cargo, the carrier should bear the consequences of a failure to offer the shipper Carmack-compliant terms.

Union Pacific compounds the error of its double standard by then overstating the magnitude of the problem it hypothesizes. The U.S. government recently has implemented measures aimed at improving security by increasing the amount of information that must be displayed on the outside of shipping

containers.[27] Union Pacific separately requires detailed shipment information, including the identities of the actual shipper and the beneficial cargo owner, to be transmitted to it before it accepts multimodal cargo for carriage. *See* Union Pacific Exempt Circular MITA 2-A, Item 230D, http://c02.my.uprr.com/wtp/pricedocs/MITA2BOOK.pdf (eff. Apr. 1, 2008). And carriers can avoid the risk entirely by securing indemnity from the intermediary carrier for any failure to offer terms that comply with the Carmack Amendment. Union Pacific argues that that remedy is insufficient. *See* U.P. Br. 48-49. But, in fact, some railroads already have revised their standard contracts to provide such indemnification. *See* Keane, *US Law — COGSA Limitations and Intermodal Transport*, 192 GARD NEWS at 24 ("Under the revision, the ocean carrier, as the railroad's contract shipper, is obligated to indemnify the railroad if the railroad loses its limitations of liability because the ocean carrier did not put its own shipper on notice of the railroad's liability limitations and Carmack opt out provisions.").

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[27] *See, e.g.*, 46 U.S.C. § 70107(m)(1)(D) (directing Secretary of Homeland Security to "examine or develop . . . improved tags and seals designed for use on shipping containers to track the transportation of the merchandise in such containers"); Final Rule, *Presentation of Vessel Cargo Declaration to Customs Before Cargo Is Laden Aboard Vessel at Foreign Port for Transport to the United States*, 67 Fed. Reg. 66,318 (Oct. 31, 2002) (promulgating stricter rules for advance screening and notification of international cargo shipments bound for United States); U.S. Customs & Border Protection, Dep't of Homeland Security, Form 1302: Inward Cargo Declaration, http://forms.cbp.gov/pdf/CBP_Form_1302.pdf (mandatory inward cargo form requiring carrier or vessel operator to identify each shipper, shipper's address, bill of lading number, container number, and container contents).

5. Even if Union Pacific could satisfy the statute by offering Carmack-compliant terms to K-Line, it did not do so

The forum-selection clause that Union Pacific offered to K-Line in the MITA requires suit to be brought in "a court of competent jurisdiction in Omaha, Douglas County, Nebraska." JA134. That forum is not one of the forums identified by the Carmack Amendment (or the Japan forum set forth in K-Line's bill of lading). *See supra* pp. 14-15, 17.[28]

Union Pacific claims that "the MITA makes clear to the world that UP provides contractual terms consistent with Carmack that shippers may select." U.P. Br. 46 n.10. But it points to nothing in the MITA — or anything else — offering shippers the option of a *forum-selection clause* consistent with the Carmack Amendment. In any event, Union Pacific made no such offer of "terms consistent with Carmack" to the shippers here. In fact, Union Pacific's MITA states the opposite: "Carmack liability coverage is **not** available for any Shipments that originate outside the borders of the United States of America." JA133 (Item 3.2(D)). Any shipper or intermediary presented with that plain statement for shipments originating in China would have no reasonable expectation that Union Pacific was offering Carmack-compliant liability coverage and forum selection as options.

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[28] Union Pacific erroneously implies that respondents are barred from making this argument because they did not discuss it in opposing certiorari. *See* U.P. Br. 44 (citing Sup. Ct. R. 15.2). Rule 15.2 requires a brief in opposition to raise any argument "that bears on what issues properly would be before the Court if certiorari were granted." Respondents do not contest that the issue of petitioners' compliance with § 10502(e) is properly before the Court. Respondents do disagree with petitioners' proposed disposition of that issue.

Union Pacific argues that, despite the unequivocal language of Item 3.2(d) of the MITA, K-Line could have divined that Carmack-compliant terms were available if K-Line had requested a separate bill of lading for the inland portion of the shipment. *See* U.P. Br. 45. Union Pacific points to Item 7.7 of the MITA, which defines "domestic" and "international" shipments for the purpose of setting the applicable rates. JA134-36. Specifically, Item 7.7(B)(3) provides: "Shipments, which are warehoused, processed, re-packaged, etc., prior or subsequent to rail movement will not be considered international traffic and shall be rated as domestic Shipments." JA135.

For several reasons, Item 7.7 of the MITA does not establish that Union Pacific offered K-Line Carmack-compliant terms. First, Item 7.7 does not say that issuing a separate bill of lading, without more, will render a shipment "domestic." Nor does it mention liability for cargo damage, which is discussed in an entirely different section of the MITA. To make the connection between Item 7.7(B)(3) and the ability to obtain Carmack Amendment protections, a shipper or its agent first would have to intuit that the "etc." in Item 7.7(B)(3) included rebilling. Then, it would have to assume that an international shipment "rated as domestic" under Item 7.7(B)(3) would also, by virtue of that rating, acquire a fictional point of origin inside the United States. Such a fiction would avoid the clear effect of Item 3.2(D), which (as noted) prohibits the application of Carmack-compliant terms to international shipments. Given the interpretive leaps of logic necessary, however, that combination of MITA provisions could not have given K-Line — let alone the shippers — a clear indication that the shippers had the option of selecting the

Carmack Amendment's protections or clear instructions on how to do so. *See Nothnagle*, 346 U.S. at 135-36 (requiring rail carrier to give customers "reasonable opportunity to discover" and take advantage of Carmack option).

Further, as Union Pacific points out, to select the abstruse Carmack Amendment "option" in Item 7.7, the shipper would have to accept "significantly" higher rates (above and beyond the rate increase for Carmack terms). U.P. Br. 45 n.9; *see* JA133 (setting Carmack rates at 250% of domestic rates). And it would be deprived of the benefits of through transportation that the United States rightly touts. *See* U.S. Br. 32. As explained above, nothing in the statute requires shippers and their agents to forgo the efficiencies of a through bill of lading to receive Carmack Amendment protection. *See supra* pp. 56-57. Requiring a shipper to navigate the murky path through the MITA identified by Union Pacific, and then to accept such substantial unrelated handicaps, is not a "fair opportunity" to obtain the protections guaranteed by the Carmack Amendment.

Finally, to the extent Union Pacific offered K-Line a "fair opportunity" to choose anything, it did not offer the option of Carmack Amendment *claims* terms. Section 10502(e) requires carriers "to provide contractual terms for liability *and claims* which are consistent with the provisions of section 11706." 49 U.S.C. § 10502(e) (emphasis added). The "terms for . . . claims" in § 11706 include the venue provisions of § 11706(d). The MITA does not mention that part of the Carmack Amendment. Item 3.2 of the MITA is titled "Carmack *Liability*." JA132 (emphasis added). It states that the Carmack Amendment provides "full-value *liability* and other *liability terms*," and

it permits a (domestic) shipper to choose "Carmack *liability* protection" by requesting "full-vaule [sic] (Carmack) *liability* protection." JA132-33 (emphases added). Nowhere are the *claims* protections of the Carmack Amendment — including the venue provisions at issue here — mentioned. Union Pacific utterly fails to give anyone — shippers or their intermediaries — any opportunity to select a Carmack-compliant forum for suit.

III. K-LINE IS A RAIL CARRIER SUBJECT TO THE CARMACK AMENDMENT

K-Line argues that ocean carriers cannot qualify as rail carriers for purposes of the Carmack Amendment. *See* K-Line Br. 22. Yet the statutory provisions defining a "rail carrier" include no such limitation. *See* 49 U.S.C. § 10102(5)-(6), (9). The STB has established that the question of rail carrier status is a functional and "particularly fact-bound" inquiry that turns on the type of transportation provided by the entity at issue. *See Association of P&C Dock Longshoremen v. Pittsburgh & Conneaut Dock Co.*, 8 I.C.C.2d 280, 293 (1992). Because K-Line's actions fall within the broad statutory terms defining a rail carrier subject to the Board's jurisdiction, the Ninth Circuit properly concluded that, in these cases, K-Line acted as a "rail carrier" subject to the Carmack Amendment.[29]

A. The Statute's Plain Language Makes Clear That K-Line Is A Rail Carrier

The Carmack Amendment applies to any "rail carrier providing transportation or service subject to

---

[29] If this Court determines that there is insufficient evidence in the record to determine whether K-Line was a rail carrier, it should remand for further factual development.

the jurisdiction of the [STB]." 49 U.S.C. § 11706(a). A "rail carrier" means "a person providing common carrier railroad transportation for compensation, but does not include street, suburban, or interurban electric railways not operated as part of the general system of rail transportation." *Id.* § 10102(5). That section in turn defines both "railroad" and "transportation" in broad terms. Specifically, § 10102(6) provides that

> "railroad" includes —
>
> (A) a bridge, car float, lighter, ferry, *and intermodal equipment used by or in connection with a railroad*;
>
> (B) the road used by a rail carrier and owned by it or operated under an agreement; and
>
> (C) a switch, spur, track, terminal, terminal facility, and a freight depot, yard, and ground, used or necessary for transportation[.]

Id. § 10102(6) (emphasis added). The section further provides that

> "transportation" includes —
>
> (A) a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use; and
>
> (B) services related to that movement, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property[.]

Id. § 10102(9).

Finally, the statute defines the STB's jurisdiction, which is coextensive with the Carmack Amendment's reach under § 11706(a), in similarly broad terms. *See id.* § 10501(a)(1). Section 10501 provides in pertinent part:

> Subject to this chapter, the Board has jurisdiction over transportation by rail carrier that is —
>
> (A) only by railroad; or
>
> (B) by railroad and water, when the transportation is under common control, management, or arrangement for a continuous carriage or shipment.

Id.

In these cases, K-Line issued bills of lading that covered transporting the cargo from ports in China to inland destinations in the midwestern United States. *See* Pet. App. 2a. Those documents left the methods of transportation completely within K-Line's control. *See, e.g.*, JA146. Using its own containers, K-Line shipped the cargo from China to the Port of Long Beach on its own vessels and then provided continuing inland transportation by Union Pacific. *See* Pet. App. 2a-3a; *see also* K-Line Br. 13 ("the Shippers loaded the cargoes in this case into 'K' Line ocean vessel containers").

Under that arrangement, K-Line furnished "railroad transportation" as a "rail carrier" under 49 U.S.C. § 10102(5). K-Line used both its own vessel to carry the goods across the ocean and containers to hold the goods during both the ocean and inland legs. Each of those items is a "vessel, . . . instrumentality, or equipment of any kind related to the movement of . . . property . . . by rail" (*id.* § 10102(9)(A)) and "intermodal equipment used . . . in connection with a

railroad" (*id.* § 10102(6)(A)). And, in arranging for and executing the multimodal shipment using those items, K-Line provided "services related to" (*id.* § 10102(9)(B)) "the movement of . . . property . . . by rail" (*id.* § 10102(9)(A)). K-Line need not own the track on which its containers travel to qualify as a rail carrier. *Cf. American Orient Express Ry. Co. v. Surface Transp. Bd.*, 484 F.3d 554, 556 (D.C. Cir. 2007). Further, the multimodal transportation that K-Line provided plainly falls within the STB's jurisdiction over transportation "by railroad and water, when" — as here — the transportation was under K-Line's "common control, management, or arrangement for a continuous carriage or shipment." 49 U.S.C. § 10501(a)(1)(B).

The STB has employed a similar analysis. It has stated that "[d]etermining rail carrier status is particularly fact-bound." *P&C Dock Longshoremen*, 8 I.C.C.2d at 293. In *P&C Dock Longshoremen*, for example, it held that a dock was a rail carrier because it performed services such as transferring cargo between lake vessels and rail cars at the dock, using tracks and locomotives to transport rail cars, and storage and handling related to the movement of property. *Id.* at 291.

In a recent case, a district court applied the same type of factual analysis to determine that a marine transport corporation (Evergreen) was a rail carrier. *See Mitsui Sumitomo Ins. Co. v. Evergreen Marine Corp.*, 578 F. Supp. 2d 575 (S.D.N.Y. 2008). There, the court noted that the Port of Los Angeles's website advertised Evergreen's container terminal, which was built so Evergreen could engage in "dedicated on-dock rail service." *Id.* at 584. That terminal contained railroad facilities used in connection with the

transfer in transit of shipments carried by Evergreen ships to railroads such as Union Pacific. *Id.* That equipment, in combination with a statement by Union Pacific's Business Director that "Evergreen provides transportation services to its customers, including the services which Union Pacific performs during the rails stage of international intermodal shipments," established that Evergreen was properly characterized as a rail carrier. *Id.*; *cf. Kyodo U.S.A., Inc. v. Cosco N. Am. Inc.*, No. 01-CV-499, 2001 WL 1835158, at *4-*5 (C.D. Cal. July 23, 2001). K-Line similarly meets the statutory requisites of a "rail carrier."

The court of appeals below followed the STB's approach. It looked to K-Line's actual actions to determine that it "engaged in railroad transportation subject to the Board's jurisdiction by providing Plaintiffs with continuous carriage by water and rail, utilizing intermodal equipment in connection with a railroad." Pet. App. 16a. In contrast, K-Line's arguments would lead to the conclusion that no company providing ocean carriage service could ever be a rail carrier under the Carmack Amendment — a result inconsistent with the statute.

B. K-Line's Efforts To Avoid The Carmack Amendment Are Unavailing

1. K-Line argues that it "never offered or promised to provide rail transportation to its customers and is incapable of providing such transportation." K-Line Br. 25.[30] It states that "the Bills of Lading obligate 'K' Line only to somehow get the cargo to the inland destinations by any means 'K' Line chooses."

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[30] K-Line points to nothing in the record to support that assertion.

Id. at 27. Yet K-Line's representations to customers and the world through its own website contradict its position before this Court. On its website, K-Line proclaims:

- That it is a "[s]pecialist[] in vessel, ocean terminal, and double-stack train operations and movement."[31]
- That it has "far reaching infrastructure of vessels, terminals, double-stack trains and containers all dedicated to providing a full range of transportation services."[32]
- That it is "a fully integrated intermodal transportation company."[33]
- And that "[m]ultiple weekly fixed-day sailings between the Pacific Northwest and Southwest and the Pacific Rim as well as weekly fixed day sailings between Europe and the United States East Coast offer direct connections to 'K' Line's exclusive double stack train service covering the United States, Canada and Mexico."[34]

Additionally, like the marine transport company in *Evergreen Marine*, K-Line operates container terminals with on-dock rail service at several U.S. ports, including Long Beach, and advertises its "on-dock DST [Double Stack Train] yard" where

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[31] K-Line website, *available at* http://www.k-line.com (last visited Feb. 9, 2010). The same language was included on its website at the time of the events in these cases. *See* http://web.archive.org/web/20050303171811/http://www.k-line.com (last visited Feb. 9, 2010).

[32] *Id.*

[33] http://www.k-line.com/KAMCorpInfo/K-Line_Profile_and_Services.asp (last visited Feb. 9, 2010).

[34] *Id.*

"containers are loaded onto dedicated trains of 'K' LINE." "K" Line Container Terminals at 14, *at* http://www.kline.co.jp/biz/terminal/pdf/terminal.pdf; *see also* Appellees' Supplemental Excerpts of Record vol. II, Tab 49, at A-22, Case No. 06-56831 (9th Cir. filed Aug. 30, 2007) (ERTA § 14(F)(7), stating Union Pacific services on-dock terminals).

2. The United States argues that a rail carrier is most naturally understood to be an entity that has "'some form of direct involvement in the movement of passengers or property' by railroad." U.S. Br. 24 (quoting *Rexroth Hydraudyne B.V. v. Ocean World Line, Inc.*, 547 F.3d 351, 362 (2d Cir. 2008)). But, as the Ninth Circuit explained in distinguishing *Rexroth* (Pet. App. 15a-16a), that case principally involved whether a so-called non-vessel-operating common carrier — essentially, a middleman that contracted with the shipper and then arranged for ocean and inland carriage — could be considered a "rail carrier," when it had no "contact with the shipped goods or any performance in the carrying of those goods." *Rexroth*, 547 F.3d at 362. Unlike the middleman in *Rexroth*, K-Line was directly involved in the movement of these goods, carrying them in its vessel and in its intermodal containers to the port and transferring those containers to rail cars for delivery to their final destination.[35] For a middleman that has no physical involvement in the move-

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[35] In *Rexroth*, the Second Circuit also applied its holding to a vessel-operating common carrier that performed the ocean leg of the shipment. But the court's implicit conclusion that such carriers cannot be rail carriers is unpersuasive, because the court never explained why the vessel-operating common carrier was not "actively involved in transporting, or 'carrying,' the shipper's cargo." 547 F.3d at 362-63.

ment of the shipper's property, there is no need for a Carmack-type liability regime.

On a similar note, the United States also argues that characterizing K-Line as a rail carrier would make the statute's definition of "freight forwarder" meaningless. *See* U.S. Br. 24. A freight forwarder holds itself out to the general public ("other than as a pipeline, rail, motor, or water carrier") as providing transportation through the use of regulated carriers. *See* 49 U.S.C. § 13102(8). "A freight forwarding company arranges for, coordinates, and facilitates cargo transport, but does not itself transport cargo." *Kirby*, 543 U.S. at 19. *Rexroth* provides an illustration of an entity that would qualify as a freight forwarder but not as a rail carrier: the middleman that contracted for carriage of goods but was not directly involved in "railroad transportation" under the statute.

K-Line, however, did provide railroad transportation services.[36] It took responsibility for the carriage of the cargo from loading to destination and carried the goods in its own multimodal containers to the point where they were loaded on to Union Pacific's rail cars. K-Line performed those services while holding itself out as a "[s]pecialist[] in vessel, ocean terminal, and double-stack train operations and movement" that offered "'K' Line's exclusive double

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[36] The United States also argues (at 24-25) that 49 U.S.C. § 10501(a)(1)(B), which defines the STB's jurisdiction as including 'transportation by rail carrier that is . . . by railroad *and water*," *id.* (emphasis added), should be interpreted to exclude any "water carrier" because a previous version of the statute specified that water carriers were included in the Board's jurisdiction. However, the omission of "water carrier" from this section is best understood to exclude only those water carriers that do not provide common-carrier railroad transportation, *i.e.*, those water carriers that do not also qualify as rail carriers.

stack train service." *Supra* p. 85 & notes 31, 34. A finding that such service constitutes "providing common carrier railroad transportation" under § 10102(5) leaves the definition of "freight forwarder" to cover agents (which enter into contracts on behalf of their principals) and "paper carriers" (which assume the obligation to transport the goods but subcontract with regulated carriers to perform the transportation) — the entities generally included in that definition. *See, e.g., Prima U.S. Inc. v. Panalpina, Inc.*, 223 F.3d 126, 129 (2d Cir. 2000) ("Freight forwarders generally make arrangements for the movement of cargo at the request of clients and are vitally different from carriers, such as vessels, truckers, stevedores or warehouses, which are directly involved in transporting the cargo. Unlike a carrier, a freight forwarder does *not* issue a bill of lading, and is therefore not liable to a shipper for anything that occurs to the goods being shipped.").

3. K-Line also argues (at 28) that recognizing its status as a rail carrier subject to the Carmack Amendment creates a conflict between the jurisdiction of the STB and the jurisdiction of the Federal Martime Commission ("FMC"). The FMC's jurisdiction is not exclusive, however. *See* 46 U.S.C. § 40301. Thus, K-Line cannot plausibly claim that, simply because the FMC exercises regulatory authority over it, its activities cannot be within the Board's jurisdiction.

To be sure, the Board's jurisdiction is exclusive over "transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers." 49 U.S.C. § 10501(b).

But, as the statute's plain language makes clear, the STB's exclusive jurisdiction extends only to those actions that constitute the provision of railroad transportation services in the United States, *see id.* § 10501(a)(2), for only in connection with those activities can an ocean carrier qualify as a rail carrier. Thus, any jurisdictional conflict would arise only as to incidents occurring during the domestic leg of an international, multimodal shipment.[37] More fundamentally, any conflict between the Board's and the FMC's jurisdiction is largely theoretical under current law, because the Board has exempted the transportation at issue here from the regulatory provisions of subtitle IV of Title 49. *See supra* p. 57. Indeed, the "insupportable" filing and reporting burdens to which K-Line points (at 29) are part of that subtitle.[38]

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[37] Courts have recognized that STB jurisdiction, while stated to be exclusive in the statute, was not intended to displace certain regulatory authority that existed prior to the ICCTA's enactment. *See, e.g., Iowa, C. & E. R.R. Corp. v. Washington County*, 384 F.3d 557, 561 (8th Cir. 2004); *Tyrrell v. Norfolk S. Ry. Co.*, 248 F.3d 517, 523 (6th Cir. 2001) (STB jurisdiction under ICCTA did not displace Federal Railroad Administration authority over rail safety regulation).

[38] Both K-Line (at 28) and the United States (at 26) suggest that the Board has acknowledged that it lacks jurisdiction over carriers such as K-Line. In the order on which they rely, however, the Board indicated that it had exempted multimodal transportation provided by such carriers from its regulation. *See Improvement of TOFC/COFC Regulations (Railroad-Affiliated Motor Carriers and Other Motor Carriers)*, 3 I.C.C.2d 869, 883 (1987). Because an agency cannot exempt from regulation an activity over which it lacks jurisdiction, the Board's order weakens, not supports, the positions of K-Line and the United States.

4. K-Line asserts that "Congress has implicitly recognized that Carmack does not apply to through shipments from foreign countries," Br. 27, by providing that suits may be brought against an originating carrier "in the judicial district in which the point of origin is located." 49 U.S.C. § 11706(d)(2)(A)(i). Because the "point of origin" of a through shipment from a foreign country is not "located" in any judicial district in the United States, the theory goes, Congress must not have intended for the Carmack Amendment to apply to such shipments.

That argument ignores that Congress has jurisdiction over a "point of origin" in the United States — not in foreign countries. When, as here, the point of origin of the rail carriage is in the United States, it is logical to construe the venue provision as allowing for suit where the cargo was loaded onto Union Pacific's train. Moreover, the Carmack Amendment's other venue provisions also permit suit to be brought against the delivering carrier in the district where the plaintiff resides or the district where the destination is located or against the carrier alleged to have caused the loss in the district where the loss occurred. *See id.* § 11706(d)(2)(A)(ii)-(iii). Thus, even assuming that the relevant "point of origin" in these cases could somehow be China, rather than Long Beach, the Carmack Amendment plainly provides domestic forums in which actions can be brought to recover for cargo damage.

IV. THESE CASES ARE FUNDAMENTALLY DIFFERENT FROM *KIRBY*

In an effort to obscure what is at stake here, petitioners erroneously contend that these cases are "[j]ust like" *Kirby*. U.P. Br. 2. When this Court decided in *Kirby* that the extension of COGSA to

inland transport under multimodal bills of lading preempted competing state laws, it did not address the applicability of federal laws, such as the Carmack Amendment. Thus, the uniformity principle announced in *Kirby* does not support the result petitioners urge. In fact, upholding a private contractual term (the Japan forum-selection clause) in the face of a federal statute (the Carmack Amendment) would frustrate an explicitly articulated federal policy embodied in a congressional enactment.

In *Kirby*, the Court held that a contractual extension of COGSA's limitation-of-liability provision in a multimodal bill of lading preempted conflicting state law because a contrary result would "undermine the uniformity of general maritime law." 543 U.S. at 28. Neither party raised the applicability of other federal law. The United States recognized as much in its *amicus* brief filed at this Court's invitation at the certiorari stage, noting that "[i]t is unsettled whether the Carmack Amendment applies to land transport under international, multimodal through bills of lading." Brief for the United States as Amicus Curiae at 11, *Kirby*, No. 02-1028 (U.S. filed Nov. 14, 2003).

Kirby differs from these cases in two significant respects. *First*, in *Kirby*, the cargo interests advocated the application of state law, whereas the carrier claimed that a federal statute, COGSA, governed via contractual extension. Here, by contrast, respondents urge the application of a federal statute — the Carmack Amendment — whereas the carriers argue that unregulated private contracts should govern. Although COGSA does not prohibit the forum-selection clauses here, nothing in petitioners' position prevents enforcement of a contractual term inconsistent with COGSA (as in *Altadis*).

Consequently, the principle of uniformity that this Court articulated in *Kirby* supports the cargo interests here, not the carriers. Under petitioners' proposals, suits arising from a single domestic train derailment could be governed by a multitude of different liability regimes with little likelihood of consistent outcomes. *See supra* pp. 45-46. By contrast, the Carmack Amendment provides a nationally uniform regime for the inland portion of multimodal shipments.

Calling K-Line's bills of lading "maritime contracts," as petitioners do (*e.g.*, U.P. Br. 1-2; K-Line Br. 21), does not change that conclusion. This Court has recognized that Congress has the primary authority to determine the substance of maritime law, even in the face of inconsistent judicial doctrine. *See, e.g., Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990). In *Miles*, the Court addressed whether the parent of a seaman who died could recover for loss of society under the general maritime law. *Id.* at 21-22. The Court held that, even though there was a cause of action for wrongful death under the general maritime law, that cause of action did not include damages for loss of society because Congress in the Jones Act had restricted the types of remedies available to seamen. *Id.* at 32-33. The Court explained that "Congress, in the exercise of its legislative powers, is free to say 'this much and no more.' An admiralty court is not free to go beyond those limits." *Id.* at 24. Here, too, Congress has set limits on the forums to which cargo interests must travel to recover for cargo damage, and the courts are "not free to go beyond those limits." *Id.*

Second, unlike *Kirby*, which concerned a limitation-of-liability provision, these cases involve a forum-

selection clause. That difference is fundamental. In *Kirby*, this Court highlighted the plaintiff's insurance coverage, *see* 543 U.S. at 21, implicitly recognizing the role insurance can play for carriers and cargo interests alike in managing risk in the transportation of goods through the trade-offs between higher carriage rates (and carrier liability for risk) versus lower carriage rates (and greater insurance coverage by cargo owners).

A forum-selection clause raises substantially different considerations. Under petitioners' proposed rule, even small-dollar claims (one of these cases involves only $3,012) must be litigated in Japan. Were this Court to adopt such a forum-selection rule for cases involving multimodal shipments that originate in foreign countries but are damaged in the United States through negligence by domestic carriers, the effect would be functionally to exonerate carriers from liability because the costs of litigating in distant lands are prohibitive for the expected return. Such a result creates a windfall for domestic carriers and unfairness to domestic cargo interests that for more than a century have litigated such claims in U.S. courts.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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REPLY BRIEF

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Nos. 08-1553 & 08-1554 (Consolidated)

In the Supreme Court of the United States

KAWASAKI KISEN KAISHA LTD., *et al.*,
Petitioners,
v.
REGAL-BELOIT CORPORATION, *et al.*,
Respondents.

UNION PACIFIC RAILROAD COMPANY,
Petitioner,
v.
REGAL-BELOIT CORPORATION, *et al.*,
Respondents.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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INTRODUCTION

Respondents agreed to assume the risk of loss while these shipments were in transit from China to the United States, under standard commercial terms that included an agreement that any disputes would be litigated in Tokyo, where the ocean carrier that issued the bill of lading is located. Respondents argue that enforcing the contracts to which they agreed would be unfair, but those policy arguments are unpersuasive, inconsistent with settled law, and more than a bit rich considering that three of the four respondents are foreign corporations with substantial operations in China.

On the actual legal merits, respondents effectively concede that prior to the non-substantive 1978 recodification the plain language (and settled interpretation) of the Carmack Amendment did not extend to inland legs of import shipments moving under through bills of lading. Even after 1978, that remained the consensus view until the Second Circuit diverged less than four years ago. *See Sompo Japan Ins. Co. v. Union Pac. R.R. Co.*, 456 F.3d 54 (2d Cir. 2006). Respondents nevertheless argue that the language Congress used in 1978 must be construed as changing that long-settled law, despite the statute's extraordinary express command that it "may not be construed as making a substantive change in the laws replaced." *See* Act of Oct. 17, 1978, Pub. L. No. 95-473, §3, 92 Stat. 1337, 1466. Even respondents' favorite case, *Sompo*, conceded that the pre-1978 language and precedents must control and that the 1995 amendments did not change the substance of Carmack in any way.

Because that issue disposes of this case, there is no need for this Court to wade into the interplay between

49 U.S.C. §§10709 and 10502. If this Court does address those issues, however, it should hold that Union Pacific properly opted out of any obligations Carmack might impose. Respondents and the United States argue that the STB has "exempted" multimodal shipments from the free contracting privilege created by §10709. But §10709 is not the sort of regulatory "requirement" for which §10502 exemptions were designed. Their argument would give the STB the power to repeal the Staggers Rail Act deregulation entirely by "exempting" all carriage from §10709 while leaving all of the ICA's common carriage and rate regulation requirements in place. Obviously that is not what Congress intended.

Regardless, Union Pacific satisfied any obligation it had by making Carmack liability terms available to UP's direct customer: "K"-Line. Respondents' belated suggestion that Carmack terms were not offered to "K"-Line is both waived and incorrect.

ARGUMENT

I. RESPONDENTS' POLICY ARGUMENTS ARE UNFOUNDED

Respondents argue at length that the position advocated by petitioners and the United States would leave cargo owners with no legal protections and no effective recourse in the event of cargo loss and would unfairly force them to litigate in distant forums. These concerns ignore commercial reality and settled law.

First, respondents effectively concede that the inland legs of import shipments moving under through bills of lading were not covered by the Carmack Amendment from its inception in 1906 until 1978 (when respondents believe the law changed). Indeed, that rule remained essentially unchallenged until the *Sompo*

decision in 2006. For a century Congress, the ICC, and the courts all agreed it was appropriate, and perfectly fair to shippers and consignees, to enforce the terms of the maritime contracts to which the parties agreed. U.S. international commerce was reasonably successful and prosperous during that period.

Second, these contracts sensibly specified venue in Japan because they were signed in Asia by Chinese shippers and a Japanese shipping company—all of whom obviously would find it far easier to litigate in Japan than in the United States. The plaintiffs here happen to be the U.S. purchasers (consignees) and their subrogated insurers rather than the Chinese shippers, but that is purely a product of how the shippers and consignees chose to allocate the risk of loss during shipment. If the shippers had retained the risk of loss during delivery (in U.S. domestic commercial parlance, an "FOB destination" rather than "FOB origin" shipment), then the plaintiffs here would be the Chinese shippers—and *respondents'* arguments would force the Chinese plaintiffs to travel across the Pacific to sue in Oklahoma. In other words, in the next case all of respondents' concerns about cargo interests being forced to litigate in inconvenient forums may cut the other way.

Third, those arguments actually cut the other way to a substantial extent *in this case*. The fact that two of these respondents are foreign insurers vividly illustrates the solution to the non-problem respondents identify. When a U.S. consignee assumes the risk of loss during transit under a bill of lading specifying a foreign forum, it can always purchase insurance from an insurer well situated to litigate in that forum. (That is just one of the many reasons why, as this Court

recognized in *Norfolk Southern Railway Co. v. James N. Kirby, Pty Ltd.*, 543 U.S. 14 (2004), it is always more efficient to buy insurance from an insurance company than from a railroad.) One of the four respondents is PICC Property & Casualty Company Limited Shanghai Branch, "a foreign insurance company with its principal place of business at 2 Floor, 700 Zhongshan Road (S), Shanghai 2000010, China." JA-47. A brief glance at the web sites of respondents Royal & Sun Alliance and Regal-Beloit Corporation reveals that they also are foreign corporations with substantial operations in China.[1]

Fourth, this Court has already grappled with this precise issue under COGSA and has held that forum selection clauses specifying an overseas forum are presumptively enforceable and *not* unfair to consignees. *See M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972); *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528 (1995). Respondents agreed to assume the risk of loss for a long multimodal voyage that was predominantly maritime in nature. If the cargo were damaged on the ocean leg, this Court's settled precedents would require respondents to sue in Japan—and would squarely reject their suggestion here that having to sue in Japan somehow changes the liability regime or leaves them without effective recourse. *Sky Reefer*, 515 U.S. at 539-41. In international commerce "[m]anifestly much uncertainty and possibly great inconvenience to both parties could arise if a suit could be maintained in any jurisdiction in which an accident might occur or if jurisdiction were

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[1] *See* http://www.regalbeloit.com/rbclocations.htm; http://www.rsagroup.com/rsa/pages/aboutus/aroundtheworld.

left to any place where the [cargo] or [defendant] might happen to be found," and "[t]he elimination of all such uncertainties by agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce, and contracting." *Bremen*, 407 U.S. at 13-14. Respondents waived any argument that this forum selection clause is oppressive under *Bremen* and *Sky Reefer*. Pet.App.9a, 41a-42a. The basic equities and policies are not altered in any way when the damage happens to occur on land. And respondents' belief that all shipping disputes involving a U.S. entity simply must be litigated in the United States is inconsistent with basic principles of international comity. *Sky Reefer*, 515 U.S. at 537.

Finally, respondents repeatedly suggest that if Carmack does not apply these shipments will be completely "unregulated." But ocean through bills and shipping contracts are regulated by COGSA and the Federal Maritime Commission, and the ICC decided decades ago that further regulation of the inland leg is unnecessary. 49 C.F.R. §1090.2.

More importantly, the vast majority of all business transactions are "unregulated" in the sense that respondents mean. Parties sign contracts, and those contracts are generally enforced. All of respondents' arguments are directed at escaping the plain terms of the efficient shipping contracts to which they agreed. And even without "statutory" regulation there are always background rules—such as the federal admiralty principles this Court applied in *Kirby*. Respondents' suggestion that "[c]arriers would have unfettered freedom to impose whatever terms they wished, including the freedom to relieve themselves of all liability for negligent cargo handling" would be

flatly inconsistent with §3(8) of COGSA on the ocean leg. If the parties agreed to terms for the land leg that were somehow inconsistent with public policy, the courts could craft appropriate principles. *This* case involves parties who agreed to be governed by COGSA terms throughout the journey, and who now seek only to enforce the sort of forum selection clause that this Court has routinely approved.

II. THE CARMACK AMENDMENT DOES NOT APPLY TO IMPORTS UNDER A THROUGH BILL

Petitioners and the United States explained at length that prior to the 1978 recodification the plain language of Carmack reached only purely domestic shipments and exports to Canada and Mexico. The courts and the ICC consistently held that Carmack applied to imports only if the parties chose not to employ a through bill of lading and instead issued separate bills of lading for the ocean and land legs (as in *Reider v. Thompson*, 339 U.S. 113 (1950)). The entire structure of ICC regulation of imports and exports was built on that premise.

Respondents muster only a weak footnote suggesting "ambiguit[y]" in that settled law. Resp.Br.36 n.14. Petitioners and the United States have explained why *Galveston, Harrisburg & San Antonio Railway Co. v. Woodbury*, 254 U.S. 357 (1920), does not support respondents' position. UP Br.25-33; U.S.Br.18-20. The fact that the jurisdictional provision interpreted in *Woodbury* was a predecessor to the provision that respondents now (incorrectly) say governs the scope of Carmack is a non sequitur. The jurisdictional provision plainly did not govern Carmack's scope in 1920, and contemporaneous courts

overwhelmingly recognized that *Woodbury*'s reasoning did not apply to Carmack. Moreover, respondents have no answer to the point that even if the *Woodbury* reasoning *were* applied to Carmack the statute still would not reach shipments, like this one, originating in a non-adjacent country. And *Union Pacific Railroad Co. v. Burke*, 255 U.S. 317 (1921), adds nothing. The *Burke* Court accepted, "[f]or the purposes of [that] case, only," the parties' stipulation that the property was moving under a separate domestic bill of lading rather than an ocean through bill, and then applied (without ever mentioning Carmack) common law principles that would have been the same whether Carmack applied or not. *Id.* at 319-20.

This case therefore turns entirely on respondents' argument that the 1978 recodification and/or 1995 amendments must be understood as radically changing the long-settled meaning of Carmack. But the present language is at least ambiguous, and in any event Congress commanded that any changes made in the 1978 recodification "may not be construed" as changing the prior law. Congress then reenacted Carmack without substantive change in the ICC Termination Act of 1995, thus ratifying a century of settled law.

A. Congress Has Not Changed The Historic Scope Of Carmack

1. Congress commanded, in statutory text passed by both Houses and signed by the President, that the 1978 recodification "may not be construed as making a substantive change in the laws replaced." Pet.App.88a. Respondents assert (with no support) that such language "simply instructs courts to do what they already do under the *Fourco Glass* presumption," and "has no role to play in the construction of *unambiguous*

language." Resp.Br.39.[2] But the "may not be construed" language is by far the clearest and most unambiguous part of the 1978 statute, and the legislative history confirms that it was the only provision Congress actually cared about. If that interpretive command could be overridden at all, it would only be by statutory language of at least comparable clarity and forcefulness. Respondents claim that the 1978 statute extended the scope of Carmack—for the first time—to the outer limits of the ICC's jurisdiction. But the text on which respondents rely does not say that—and certainly does not say it with sufficient clarity to trump Congress's direct instruction that the statute "may not be construed" as changing the prior law.

"K"-Line explained in its opening brief (30-31) that, under the present text, Carmack is triggered when a "rail carrier providing transportation or service subject to the jurisdiction of the [STB] ... receives [property] for transportation under this part," meaning Part A of the ICA. 49 U.S.C. §11706(a). Part A extends "only to transportation in the United States." §10501(a)(2). Because the receiving carrier here ("K"-Line) is not a "rail carrier" and did not receive property for rail transportation in the United States, Carmack does not apply. Both this Court and the ICC have made clear

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[2] Respondents wrongly claim that petitioners "place great weight on the presumption that, when Congress recodifies a statute, it does not intend to change the statute's meaning." Resp.Br.21, 34-40. Petitioners and the United States placed almost no weight on that presumption—merely observing that this Court likely would not have interpreted the 1978 codification as changing the law even if Congress had not expressly forbidden such interpretations. UP Br.22-23.

that an ocean carrier is not a rail carrier just because it offers subcontracted inland transportation or owns equipment used by a railroad. *United States v. Am. Ry. Express Co.*, 265 U.S. 425 (1924); *Edwards v. Pacific Fruit Express Co.*, 390 U.S. 538 (1968); *Joint Application of CSX Corp. & Sea-Land Corp.*, 3 I.C.C.2d 512 (1987). The Act's expansive definitions of what a "railroad" and "transportation" "include" just ensure that everything an actual "rail carrier" does is regulated, "to prevent overcharges and discriminations from being made under the pretext of performing ... additional services." *Cleveland, Cincinnati, Chicago & St. Louis Railway Co. v. Dettlebach*, 239 U.S. 588, 594 (1916). Respondents' approach would play havoc with the ICA's distinctions between rail, motor, and water carriers, and between carriers, forwarders, and brokers.

UP adopted "K"-Line's arguments and also refuted respondents' suggestion that *UP* received property for domestic transportation within the meaning of Carmack when it accepted this cargo from "K"-Line in Long Beach. UP Br.23, 26 n.2. Carmack draws important distinctions between the "receiving" carrier and connecting or delivering carriers. Only the first carrier receiving property directly from the shipper is the "receiving" carrier. Since 1906 the whole point of Carmack has been to centralize responsibility under a single through bill, issued by the carrier with whom the shipper dealt directly, and to eliminate the once-common practice of connecting carriers issuing separate bills. The crucial issue is "where the obligation of the carrier as receiving carrier originated." *Reider*, 339 U.S. at 117. Treating UP as a "receiving" carrier obliged to issue a separate bill of

lading would read Carmack as mandating the very commercial problem Carmack was designed to solve.

Additionally, as the United States explains (U.S.Br.21-23), the "liability imposed under" Carmack is still expressly limited to transportation "in the United States or from a place in the United States to a place in an adjacent foreign country when transported under a through bill of lading." §11706(a). Respondents read that limitation as modifying only the immediately preceding subclause concerning connecting carriers. Resp.Br.30 n.8. But viewing Carmack "'as a whole,'" *Nken v. Holder*, 129 S. Ct. 1749, 1756 (2009), and in light of its history and purpose, that language is best read as modifying the entire sentence. The indentation that makes that language appear to be a part of subclause (a)(3) was introduced in 1995 and was surely a drafting accident. *See* Addendum 5a-6a (comparing 1978 and current versions). It does not appear in the parallel provision governing motor carriers. *See* 49 U.S.C. §14706; Pet.App.73a.

And why would Congress want to impose new, universal extraterritorial liability on the receiving or delivering carrier for any damage caused by either, but then confine their liability for damage caused by *connecting* carriers to the historic scope of Carmack? Imagine a through shipment by ocean carrier from Argentina to Mexico and then overland by rail from Mexico to Chicago. Under the historic and correct interpretation, Carmack does not apply. In respondents' view, however, the U.S. delivering carrier and the ocean carrier are both strictly liable under Carmack for any damage either causes, but *not* for damage caused by a Mexican rail carrier on its line in

Mexico. Or imagine an export through shipment from Chicago to Germany. In respondents' view, the initial U.S. rail carrier would be strictly liable under Carmack for damage during the U.S. inland leg and the delivering leg in Germany—but not for damage during the ocean leg or on a connecting line in France. Respondents' interpretation would thus make Carmack applicable to international ocean shipments but leave large, arbitrary holes in the liability it imposes—requiring the shipper to determine and prove where the damage actually occurred. That would frustrate Carmack's core purpose. *See Mo., Kan. & Tex. Ry. v. Ward*, 244 U.S. 383, 386-87 (1917); U.S.Br.21.

The current language is *at least* ambiguous—particularly when the history, full statutory context, and consequences are considered. Respondents' reading would ignore Congress's interpretive instructions elsewhere in the statute, treat ocean carriers as "rail carriers," transform the regulation of ocean carriers and call into doubt the settled jurisdiction of the FMC, produce results inconsistent with Carmack's original purpose, and "defeat[]" the "apparent purpose of COGSA," *Kirby*, 543 U.S. at 29, by rendering COGSA §7 a virtual nullity. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000) ("The meaning—or ambiguity—of certain words or phrases may only become evident when placed in context."); *Corley v. United States*, 129 S. Ct. 1558, 1567 n.5 (2009) (same).

2. The 1995 ICCTA made no relevant substantive changes to Carmack. It just replaced references to the ICC with the new STB, split Carmack for the first time into separate provisions governing rail and motor carriers, added the indentation discussed above, and

moved what remained of former §10730 (dealing with declared value liability limitations) into §11706. *See* Addendum 5a-6a; Pet.App.69a, 86a.

The courts have uniformly recognized that the ICCTA "worked no substantive change on the Carmack Amendment." *Project Hope v. M/V IBN SINA*, 250 F.3d 67, 73 n.4 (2d Cir. 2001); *see also, e.g., White v. Mayflower Transit, LLC*, 481 F. Supp. 2d 1105, 1109 (C.D. Cal. 2007) (same), *aff'd*, 543 F.3d 581 (9th Cir. 2008); *Miracle of Life, LLC v. N. Am. Van Lines, Inc.*, 368 F. Supp. 2d 494, 496 n.5 (D.S.C. 2005) (same); *Molloy v. Allied Van Lines, Inc.*, 267 F. Supp. 2d 1246, 1251 n.3 (M.D. Fla. 2003) (same). The legislative history confirms that view. *See, e.g.*, H.R. Rep. No. 104-422, at 195 (1995) (Conf. Rep.) ("The new section [of Carmack] makes no substantive change in the rules of liability for loss or damage to rail shipment.").

Respondents do not dispute that courts between 1978 and 1995 uniformly held Carmack inapplicable to import shipments. Thus, far from effecting a "repeal[]" (Resp.Br.38), Congress *ratified* the longstanding judicial and agency interpretation of Carmack when it re-enacted Carmack in the ICCTA. *See* UP Br. 33-34; U.S.Br.21-23.

3. Respondents have entirely too little faith in the legal profession when they assert (Resp.Br.35-36) that no one could have figured out that the present statute is consistent with Carmack's historic scope. The statute *at least* permits such a reading, and it is supported by plenty of recent commentary[3] and most

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[3] *See, e.g.*, 1-3 Saul Sorkin, *Goods in Transit* §3.05[1][a] (2009) (Carmack "cover[s] the property while it is transported in the

of the case law. Even the Second Circuit in *Sompo* recognized that the pre-1978 language remained controlling after 1995. *See* 456 F.3d at 64. And the courts that have addressed Congress's "may not be construed" language (including this Court) have uniformly respected it. *See, e.g., Burlington N. R.R. Co. v. Okla. Tax Comm'n*, 481 U.S. 454, 457 n.1 (1987).[4] It has never been possible to understand the Carmack Amendment without looking at the case law—and that hardly makes Carmack an unusual statute.

United States or from a place in the United States to a place in an adjacent foreign country when transported under a through bill of lading."); Vibe Ulfbeck, *Multimodal Transports in the United States and Europe – Global or Regional Liability Rules?*, 34 Tul.Mar.L.J. 37, 60 n.92 (2009) (Carmack "does not apply to imports and does not apply to exports to nonadjacent foreign countries."); Jack Knebel & Denise Blocker, *United States Statutory Regulation of Multimodalism*, 64 Tul.L.Rev. 543, 555 (1989) (same); Richard Palmer & Frank DeGiulio, *Terminal Operations and Multimodal Carriage: History and Prognosis*, 64 Tul.L.Rev. 281, 329 (1989) (same); Saul Sorkin, *Limited Liability in Multimodal Transport and the Effect of Deregulation*, 13 Tul.Mar.L.J. 285, 294 (1989) (same).

[4] *See also Emerson Elec. Supply Co. v. Estes Express Lines Corp.*, 451 F.3d 179, 184 (3d Cir. 2006); *Rymes Heating Oils, Inc. v. Springfield Terminal Ry. Co.*, 358 F.3d 82, 90 n.7 (1st Cir. 2004); *Zatz v. United States*, 149 F.3d 144, 146 (2d Cir. 1998); *Gordon v. United Van Lines, Inc.*, 130 F.3d 282, 287 n.1 (7th Cir. 1997); *Cent. Freight Lines v. ICC*, 899 F.2d 413, 423 (5th Cir. 1990); *Kan. City Indus., Inc. v. ICC*, 902 F.2d 423, 437-38 (5th Cir. 1990); *Trailer Marine Transp. Corp. v. Fed. Mar. Comm'n*, 602 F.2d 379, 383 n.18 (D.C. Cir. 1979); *Riduco, S.A. v. A.P. Moller-Maersk A/S*, 2009 WL 4680197, *3 (N.D. Ill. 2009).

B. Respondents' "Separate Bill Of Lading" Arguments Are Misplaced

Respondents attack the reasoning of *Swift Textiles, Inc. v. Watkins Motor Lines, Inc.*, 799 F.2d 697 (11th Cir. 1986), and suggest that the writ should be dismissed because petitioners have not defended it. Resp.Br.30-34 & n.11.

Petitioners have not "abandoned" their certiorari argument (or the circuit split) by not defending the precise reasoning of *Swift*. UP's petition, like its merits brief, forthrightly explained that "[t]he *Swift* court's articulation of the test for Carmack's applicability is in some tension with other aspects of its reasoning," but nonetheless "correctly implements the statutory language of Carmack prior to the 1978 codification." Pet.17-18. UP's petition certainly did not rely on *Swift* as the sole "origin" of the traditional rule. *Contra* Resp.Br.32. It explained that that rule is the best reading of this Court's decision in *Reider* (Pet.25) and also cited most of the important older cases (Pet.21-22 & n.4).

Respondents' point seems to be that *Swift* articulated the rule in terms of whether a separate bill of lading was issued for the domestic leg, whereas *Reider*, the *Alwine* line of cases, and petitioners' merits briefs have more precisely explained that the question is whether a through bill was issued or instead separate bills governing the sea and land legs, respectively (as in *Reider*). The difference between those two articulations is quite subtle—and comes down to the hypothetical point that when a through bill is issued, any later issuance of a duplicative separate bill would not trigger Carmack. *See* UP Br.33-34 & n.6; U.S.Br.28-29 & n.11. But the question presented is

whether "the Carmack Amendment applies to the inland leg of an international, multimodal shipment under a 'through' bill of lading," Pet.i, and UP's petition repeatedly explained that the key issue is whether the shipment is moving under a through bill. *See* Pet.13-14, 16, 21, 24, 26, 27, 28. At the only point in the petition where this distinction could possibly have mattered—its description of what "K"-Line would have needed to do to invoke Carmack—the petition phrased it exactly right. *See* Pet.32-33. And the circuits do not disagree about what to do with hypothetical overlapping bills of lading; they disagree about whether an ocean through bill matters *at all* to the application of Carmack. *Compare* Pet.13-14 *with* Pet.20-21.

Respondents misunderstand Carmack's language providing that "[f]ailure to issue a receipt or bill of lading does not affect the liability of a rail carrier." 49 U.S.C. §11706(a). If (as in *Reider*) the ocean bill terminated at the port and Carmack therefore required a domestic bill, the carrier could not escape liability simply by not issuing the bill of lading that Carmack requires. That proviso has no application where (as here) Carmack does not require that a bill of lading be issued.

C. Respondents' Uniformity Arguments Are Inconsistent With *Kirby* And Unpersuasive

1. Respondents wrongly claim that extending Carmack to the inland leg of multimodal import shipments would best serve the "uniformity goals this Court recognized in *Kirby*." Resp.Br.43. This Court explained in *Kirby* that if the terms of the bill of lading "did not apply equally to all legs of the journey," parties "would not enjoy the efficiencies" of through

shipping arrangements ... [a]nd the apparent purpose of COGSA, to facilitate efficient contracting in contracts for carriage by sea, would be defeated." 543 U.S. at 29. As UP explained (Br.37-38), respondents' proposed regime would make the law governing particular cargo depend on a threshold factual inquiry about where damage occurred that will often be very unclear and for which Congress supplied no standards or procedures.

Respondents offer the counter-observation that in cases involving a clear locus of damage to large numbers of containers (such as a derailment) a single liability regime governing every piece of cargo on a particular train would have *different* advantages for judicial efficiency. Resp.Br.43-46. Fair enough. But large-scale catastrophes are not the only, or even the primary, cause of damage to cargo transported from abroad. It is far more common for individual containers (or packages within containers) to be damaged by, *e.g.*, rough handling, water seepage, or theft. *See* Hugh Kindred & Mary Brooks, *Multimodal Transport Rules* 143 (1997). In *those* situations, the concerns this Court identified in *Kirby* predominate.

2. Respondents assert that the full-journey-uniformity this Court spoke of in *Kirby* might not be achieved if the parties contract for different rules inland than on the ocean leg. Resp.Br.46-48. The international shipping industry is highly competitive, consisting of "more than 140 different shipping lines (not to mention countless NVOCCs)" that serve one port alone. Resp.Br.45. The STB agrees that the market for inland shipping of containerized goods is also robust. Competitive markets gravitate to efficient terms, and the dominant industry practice is to extend

the key terms of COGSA inland. 1 Thomas J. Schoenbaum, *Admiralty and Maritime Law*, 597-99 (4th ed. 2004); Michael F. Sturley, *Maritime Cases About Train Wrecks: Applying Maritime Law to the Inland Damage of Ocean Cargo*, 40 J.Mar.L. & Com. 1, 9 (2009). Regardless, the fact that parties might not elect the "efficient choice" this Court spoke of in *Kirby* is no reason to deny them the option altogether—as respondents would. 543 U.S. at 26.

3. Respondents note that "K"-Line's bill of lading defers to "mandatory national law" in other countries. Resp.Br.52-53. But *United States* rail carriers have operated for decades on the understanding—reinforced by *Kirby*—that the ocean bill, rather than Carmack, governs the inland leg of an import shipment. And the mandatory liability regimes in many other countries are more consistent with COGSA than Carmack is.[5]

Respondents and *amici* make much of AAR's comments during the negotiation of the Rotterdam Rules. AAR opposed the "Draft Instrument" because it would have replaced the "well understood system of handling rail freight loss and damage claims" based on liability and pricing terms set forth in the rail carriers' circulars. U.N. doc. No. A/CN.9/WG.III/ WP.28, at 33 (Jan. 31, 2003) (*Comments on Behalf of the Association of American Railroads*). AAR's filing is ambiguous about the precise role that Carmack played in the development of U.S. law, but clearly explained that the U.S. status quo allows ocean carriers and railroads to extend COGSA inland and enforce Himalaya clauses.

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[5] *See* United Nations Conference on Trade and Dev., Implementation of Multimodal Transport Rules – Comparative Table (Oct. 9, 2001), *available at* http://www.unctad.ch/en/docs/posdtetlbd2a1.en.pdf.

Id. AAR also explained that a "critical feature" of the U.S. legal regime "is that a claim for loss or damage can be brought against the railroads only by ocean carriers because the railroads do not have privity of contract with any other party in the transportation chain, including the shipper," and that venue for such suits may be specified by contract between the ocean carrier and the railroad. *Id.*

III. EVEN IF CARMACK EXTENDS TO IMPORT SHIPMENTS, PETITIONERS OPTED OUT

This Court need not reach the opt-out issues, but if it does it should hold that UP and "K"-Line contracted out of the ICA (including Carmack) under §10709, or that the terms UP offered satisfy any obligations imposed by §10502(e).

A. The STB Cannot "Exempt" Transportation From §10709

1. Respondents and the United States argue that because §10709 is part of the ICA, the STB's TOFC/COFC exemption order "exempts" this carriage from §10709. That theory fails because the STB's exemption authority does not extend to §10709, and because the exemption itself covers only the regulatory "requirements" of the ICA.

Congress enacted the Staggers Act "to rid railroads of unnecessary and inefficient regulation[]." *Tokio Marine & Fire Ins. Co. v. Amato Motors, Inc.*, 996 F.2d 874, 877 (7th Cir. 1993). Section 10709 was viewed as one of the bill's most significant achievements. *See, e.g.*, H.R. Rep. No. 96-1430, at 100 (1980) (Conf. Rep.) ("The conferees stress that the establishment of contract rates is a significant aspect of the new

freedom ... to market rail transportation more effectively."); H.R. Rep. No. 96-1035, at 58 (1980) ("Rail carriers and shippers should be free to negotiate and enter into contracts ...."); S. Rep. No. 96-470, at 24 (1979) ("A contract rate provision is one of the most important provisions in the bill" and is "an effort to encourage carriers and purchasers of rail service to make widespread use of such agreements"). Section 10502 is an additional, parallel deregulatory provision—in some ways more powerful than §10709 and in some ways less—that permits the STB to exempt categories of carriage from the ICA altogether when it determines that regulation is not needed to further the ICA's transportation policy goals or to prevent "abuses of market power." §10502(a); H.R. Rep. No. 96-1430, at 105.

The STB's authority to exempt traffic from ICA provisions selectively (*see* U.S.Br.31) illustrates why respondents and the government cannot be right. Their interpretation would give the STB authority to "exempt" a class of carriage (or all carriage) from §10709 *only*, while leaving the entire structure of regulation in place. In other words, they suppose that Congress gave the STB the power—in an ostensibly deregulatory provision—to repeal the Staggers deregulation entirely and return the industry to "the Kafkaesque regulatory regime of the pre-Staggers era." H.R. Rep. No. 104-311 at 91 (1995); *see also* STB Ex Parte No. 669, 72 Fed. Reg. 16,316 (Apr. 4, 2007). There is no reason to impute to Congress such a self-defeating intention, particularly with no support from the text or legislative history.

The better reading is that §10502 authorizes the STB to "exempt" categories of carriage from the

regulatory *requirements* of the ICA but not from provisions—like §10709 and §10502 itself—that *release* shippers and carriers from those requirements. The STB actually phrased its TOFC/COFC exemption order in terms of the ICA's "requirements." *See* 49 C.F.R. §1090.2; *see also* Improvement of TOFC/COFC Regulation, 45 Fed. Reg. 79,123 (Nov. 28, 1980). Reading "requirements" to mean "privileges" exceeds the bounds of any *Auer* deference owed to an agency brief filed in the Second Circuit. Resp.Br.61.[6] Regardless, the phrasing indicates that even the STB once held a more common-sense understanding of §10502. And the United States acknowledges that its arguments here are inconsistent with its representations to this Court in *Kirby*. U.S.Br.31 n.12.[7]

2. Section 10502(e) does not impose any obligation on carriers to offer Carmack terms. It is phrased as a limitation on the STB's *exemption authority*, not an independent source of duties for carriers. *See, e.g., Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 166-67 (2004) (savings clause will not be read to expand or create any affirmative right). And nothing in it suggests an intent to repeal or limit the contracting authority granted elsewhere. Respondents focus on the word "alternative" (Br.64) in the second sentence of §10502(e), but ignore the rest of that sentence—which is also phrased as a savings clause clarifying that "[n]othing in this subsection or [Carmack] shall prevent

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6 That brief clearly is not entitled to *Chevron* deference.

7 With respect, the potential applicability of Carmack was not "ancillary" in *Kirby*; it was a "threshold issue" that directly affected "the appropriateness of" granting certiorari. U.S. *Kirby* Invitation Br. 11.

rail carriers from offering alternative terms." Two consecutive negative statements about what a §10502 exemption *does not do* cannot add up to imposing an affirmative obligation.[8]

Respondents and the government observe that when a shipper of *non-exempt* freight is presented with an unappealing offer to contract under §10709, it can always fall back on the railroad's common carriage obligations and demand Carmack-compliant tariff service instead. They hypothesize that shippers of *exempt* freight should always have an equivalent option, even if the STB has exempted the railroad from common carrier obligations.

Either as a freestanding policy concern or as an explanation of Congress's intentions, those arguments will bear very little weight. A §10502 exemption represents the STB's judgment that the market is competitive enough that regulation is not needed. If the STB believes that shippers will not be offered reasonable terms, it can limit its exemption to preserve whatever regulation it thinks necessary.

Respondents and the government also would distort the statute to preserve an "alternative" that would have no practical value to shippers. The STB's exemption means that railroads are free to refuse TOFC/COFC service altogether, and §10502(e) itself makes clear that railroads cannot be compelled to offer Carmack terms at any particular price. The only practical effect of respondents' interpretation would be

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[8] The snippets of §10709(f)'s legislative history cited at Resp.Br.59-60 plainly are not referring to §10502(e)—since §10502 authorizes the STB to exempt railroads from their "common carrier obligations."

to put railroads to an artificial choice between refusing service and making an completely uneconomic alternative "Carmack-compliant" offer. That would serve no coherent policy purpose.

3. Respondents suggest that §10709 is inherently inapplicable to exempt carriage, regardless of how the STB structures its exemption orders. The government does not go that far (U.S.Br.31 n.12), for good reason.

Respondents' reading offers no way to distinguish among exemption orders, and would make §10709 unavailable whenever the STB has exempted carriage from *any* ICA requirement, however small—such that any attempt at modest *deregulation* would have the actual effect of very significant *re-regulation.* Congress surely did not intend such arbitrary consequences.

4. Respondents and the government also suggest that §10502(e) "specifies contractual terms that a carrier must offer before a contract for carriage is made, whereas Section 10709 specifies the effect of such a contract after it has been executed." U.S.Br.30. But §10709 leaves no room for preconditions elsewhere in the ICA. It provides that carriers "may enter into a contract with one or more purchasers of rail services to provide specified services under specified rates and conditions," and that a contract "authorized by this section, and transportation under such contract, shall not be subject to this part, and may not be subsequently challenged before the Board or in any court on the grounds that such contract violates a provision of [the ICA]." §10709(a), (c)(1).[9] The gist of

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[9] When Congress enacted the ICCTA, it *removed* certain "statutory preconditions" from §10709 (filing and agency-approval

the government's argument is that the *terms* of a §10709 contract are not subject to the ICA and cannot be challenged, but that the *enforceability* of such contracts is subject to, and challengeable under, preconditions drawn from §10502(e). The plain language of §10709 does not draw such a distinction. Section 10709 contracts are "authorized by" §10709 itself, and are not "subject to" any provision of the ICA, including §10502(e).

B. UP Fulfilled Any Obligation Under §10502(e) To Offer Carmack-Compliant Terms

1. Respondents argue that U.S. railroads must be bound by Carmack terms unless they ensure that such terms were offered to the unknown foreign shippers by the ocean carrier. *See* Resp.Br.66-76. As the government explains, that would be an "unworkable regime" and would "undermine a significant benefit of through transportation." U.S.Br.32.

Kirby and *Great Northern Railway Co. v. O'Connor*, 232 U.S. 508 (1914), establish the sensible rule that a rail carrier providing service on a through bill may rely on its contracts with its direct counterparty. In *Great Northern*, this Court held that "the Railroad ... was obliged to treat the [freight] Forwarder *as shipper*," and that "the carrier had the right to assume that the [intermediary] could agree upon the terms of the shipment," regardless of whether there had been a "*bona fide* effort" between the shipper and the intermediary "to agree on a valuation" of the goods. *Id.* at 514-15. Because *Great Northern*

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conditions) as "unneeded and unduly burdensome regulation." H.R. Rep. No. 104-422, at 175 (1995) (Conf. Rep.).

involved a shipment "from Minneapolis to Portland," *id.* at 513, Carmack clearly applied.

Relying on *Great Northern*, this Court held in *Kirby* that a shipping "intermediary can negotiate reliable and enforceable agreements with the carriers it engages." 543 U.S. at 33. The Court explained why this policy makes sense, given the realities of modern international shipping. *See* UP Br.47; Part I, *supra.*

Burke is not to the contrary. *See* Resp.Br.72-73. In that case, the carrier and the shipper stipulated that the inland carriage was governed by a separate domestic bill of lading and tariff filed with the ICC. 255 U.S. at 319-20. The only issue before the Court was whether that domestic tariff authorized both full and reduced-liability rates. *Id.* at 322-23. Because this Court found that the carrier had "but one applicable published rate east of San Francisco," it determined that the carrier "could not lawfully have given" *anyone* a choice of rates—and the issue of whether a choice presented only to the ocean carrier would have been good enough simply was not presented. *Id.* at 323. Unsurprisingly, the litigants in *Burke* did not even cite this Court's then-recent decision in *Great Northern.*

Respondents rely heavily on *New York, New Haven & Hartford Railroad Co. v. Nothnagle*, 346 U.S. 128 (1953), and its holding that under Carmack (and the common law it codified) a shipper must be given a "fair opportunity" to select full liability rates before released value rates are enforceable. Section 10709 imposes no such limitations. But more importantly, *Nothnagle* does not speak to *who* must be given a "fair opportunity" to select rates. *Great Northern* and *Kirby* squarely hold that a railroad may treat its direct

counterparty as the "shipper" for purposes of that doctrine.

2. As explained in UP's petition and opening brief, "K"-Line could have elected Carmack terms under UP's MITA by drafting its ocean bill of lading to terminate at the U.S. port of entry, just like the ocean carrier in *Reider* did. *See* UP Br.44.

Because respondents did not contest this fact in their opposition brief, they have waived the point. Respondents argue that Rule 15.2 applies only when a belated dispute "'bears on what issues properly would be before the Court if certiorari were granted.'" Resp.Br.77 n.28. But the question presented, in part, is "[w]hether the Ninth Circuit must be reversed because it ... erred by holding that carriers providing exempt transportation cannot contract out of Carmack ... by offering Carmack-compliant terms to the rail carrier's own direct customer?" UP Pet.i. Respondents contend, precisely, that that aspect of the question presented is not before the Court because it assumes a factual premise they now (belatedly) challenge. Regardless, Rule 15.2 has been held applicable to *all* factual statements in the petition that go unopposed at the certiorari stage. *See, e.g., Carcieri v. Salazar*, 129 S. Ct. 1058, 1068 (2009); *Aetna Health Inc. v. Davila*, 542 U.S. 200, 212 n.2 (2004); *Bd. of County Comm'rs v. Brown*, 520 U.S. 397, 413 n.2 (1997).

Even if this Court were inclined to forgive the waiver, it should conclude—as the United States has—that "K"-Line had a fair opportunity to obtain Carmack terms. *See* UP Br.44-46. As the MITA's terms make clear, UP's concern is with shippers attempting to pass off purely domestic shipments as international, in order to secure the much lower international rates. JA-134-

136. If an international shipper wanted to opt into the more expensive domestic shipping rates, including the Carmack option (which is 250% more expensive than even the domestic baseline) UP obviously would have no objection. Indeed, the MITA *forces* an international shipper into the domestic rates if it does anything at all with the containers ("warehoused, processed, repackaged, etc.") prior to putting them on the train. JA-134-135.[10]

Respondents actually had a fair opportunity *themselves* to opt into the Carmack regime—either by insisting that "K"-Line's bill of lading cover only the ocean leg (as in *Reider*) or by contracting with "K"-Line only for ocean transport to Long Beach and then arranging separately for domestic rail transportation. UP's MITA was at all relevant times publicly available on its website.[11] As UP pointed out (Br.46), the old common law "fair opportunity" principles *did not* require that the parties actually discuss the various alternatives before contracting. And this Court held in *Kirby*, citing *Nothnagle*, that the shipper "had the opportunity to declare the full value of the machinery and to have [the carrier] assume liability for that value" when "negotiating the [ocean] bill." 543 U.S. at 19. The same was true here.

Respondents contend that UP's offer is not "fair" because electing Carmack terms would have cost more and deprived the shippers "of the benefits of through transportation." Resp.Br.79. This is dangerous

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[10] Respondents vastly overstate (Resp.Br.68-70) the complexity of the MITA and the ERTA. *See* UP Br.11-12, 44-46, 46 n.10.

[11] *See* UP SER (9th Cir. filed Aug. 27, 2007) 92 ¶2.

nonsense. The only benefits of conventional through transportation that respondents would have lost if they or "K"-Line had elected Carmack terms—cheaper shipping prices reflecting limited liability for all carriers, and consistent terms for the whole voyage—are inherent to Carmack's application (and precisely why, in the real world, shippers almost *never* select Carmack terms). UP is not obligated to price a shipping option involving uncapped strict liability for undiscovered damage to sealed cargo at the same level it has been pricing liability capped at $500 per container. Section 10502(e) makes that crystal clear.

Respondents suggest (Resp.Br.74) that UP is somehow trying to have it both ways, but the truth is opposite. Respondents want all the benefits of the efficient default rules they are now laboring to destroy, without accepting the costs. Put differently, respondents want UP to provide the full-value cargo insurance that two of these respondents procured elsewhere, without charging for it. This Court should not be fooled.

Finally, respondents argue that UP does not offer a "fair opportunity" to select *venue* terms consistent with Carmack. Resp.Br.77-80. Again, these arguments are waived. The MITA specifies preconditions "for a shipment to be subject to the terms of 49 U.S.C. §11706." JA-132-133. Regardless, neither §10502(e) nor the "fair opportunity" doctrine respondents extract from *Nothnagle* properly applies to forum selection clauses.

In cases like *Bremen* and *Sky Reefer* this Court has enforced forum clauses in ocean bills of lading without any inquiry into whether the shipper had a "fair opportunity" to specify something else. There is no

reason to force a Japanese ocean carrier to offer a Chinese shipper, in Shanghai, the option of an Oklahoma forum before the two of them can agree to litigate disputes in Japan. And it often will not even be possible for the carrier to determine up front what venue the background law would later specify for a lawsuit. Carmack, for example, authorizes suit against connecting carriers only "in the judicial district in which such loss or damage is alleged to have occurred." §11706(d)(2)(A)(iii). And venue for suit against the delivering carrier varies based on who happens to sue. §11706(d)(2)(A)(ii); Part I, *supra*.

Nor does a forum selection clause affect the "contractual terms for liability and claims" discussed in §10502(e). As this Court explained in *Sky Reefer*, there is an important "difference ... between applicable liability principles and *the forum* in which they are to be vindicated." 515 U.S. at 534 (emphasis added). This Court held that a Tokyo forum selection clause did not violate COGSA's express prohibition against contracts varying COGSA's liability terms. And "claims" in this context refers to the process by which shippers present a claim for cargo damage *to the carrier*, not to lawsuits in court. Carmack has specified terms for the filing of "claims" and lawsuits since 1915, *see* Pet.App.97a, and has always distinguished between them. The Staggers Act added the current venue provisions in order to protect *railroads* from suit in inconvenient jurisdictions. *See* H.R. Rep. No. 96-1430, at 103; Pet.App.44a. It is therefore unsurprising that Congress did not include venue among the Carmack terms from which an STB exemption may not "relieve" a carrier. §10502(e). (Instead, it gave parties the

option to select a forum by contracting under §10709(c)(2).)

CONCLUSION

This Court should vacate the judgment of the Ninth Circuit and reinstate the district court's judgment or, at a minimum, remand for further proceedings consistent with this Court's opinion.

Respectfully submitted,

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ADDENDUM

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34 Stat. 584 (1906)

* * * SEC. 1. That the provisions of this Act shall apply to any corporation or any person or persons engaged in the transportation of oil or other commodity, except water and except natural or artificial gas, by means of pipe lines, or partly by pipe lines and partly by railroad, or partly by pipe lines and partly by water, who shall be considered and held to be common carriers within the meaning and purpose of this Act, and to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad (or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment), from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States, and also to the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of transshipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country: *Provided, however,* That the provisions of this Act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property wholly within one State and not shipped to or from a foreign country from or to any State or Territory as aforesaid. * * *

41 Stat. 474 (1920)

* * * Sec. 400 The first four paragraphs of section 1 of the Interstate Commerce Act, as such paragraphs appear in section 7 of the Commerce Court Act, are hereby amended to read as follows:

"(1) That the provisions of this Act shall apply to common carriers engaged in–

(a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment; or

(b) The transportation of oil or other commodity, except water and except natural or artificial gas, by pipe line, or partly by pipe line and partly by railroad or by water; or

(c) The transmission of intelligence by wire or wireless;—

from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States through a foreign country to any other place in the United States, or from or to any place in the United States to or from a foreign country, but only insofar as such transportation takes place within the United States.

* * *

92 Stat. 1359 (1978)

*** * * § 10501. General jurisdiction**

(a) Subject to this chapter and other law, the Interstate Commerce Commission has jurisdiction over transportation—

(1) by rail carrier, express carrier, sleeping car carrier, water common carrier, and pipeline carrier that is—

(A) only by railroad;

(B) by railroad and water, when the transportation is under common control, management, or arrangement for a continuous carriage or shipment; or

(C) by pipeline or by pipeline and railroad or water when transporting a commodity other than water, gas, or oil; and

(2) to the extent the transportation is in the United States and is between a place in—

(A) a State and a place in another State;

(B) the District of Columbia and another place in the District of Columbia;

(C) a State and a place in a territory or possession of the United States;

(D) a territory or possession of the United States and a place in another such territory or possession;

(E) a territory or possession of the United States and another place in the same territory or possession;

(F) the United States and another place in the United States through a foreign country; or

(G) the United States and a place in a foreign country. * * *

49 U.S.C.A. §10501 (2009)

§ 10501. General jurisdiction

(a)(1) Subject to this chapter, the Board has jurisdiction over transportation by rail carrier that is—

(A) only by railroad; or

(B) by railroad and water, when the transportation is under common control, management, or arrangement for a continuous carriage or shipment.

(2) Jurisdiction under paragraph (1) applies only to transportation in the United States between a place in—

(A) a State and a place in the same or another State as part of the interstate rail network;

(B) a State and a place in a territory or possession of the United States;

(C) a territory or possession of the United States and a place in another such territory or possession;

(D) a territory or possession of the United States and another place in the same territory or possession;

(E) the United States and another place in the United States through a foreign country; or

(F) the United States and a place in a foreign country. * * *

92 Stat. 1453 (1978)

§ 11707. Liability of common carriers under receipts and bills of lading

(a)(1) A common carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under subchapter I, II, or IV of chapter 105 of this title shall issue a receipt or bill of lading for property it receives for transportation under this subtitle. That carrier and any other common carrier that delivers the property and is providing transportation or service subject to the jurisdiction of the Commission under subchapter I, II, or IV are liable to the person entitled to recover under the receipt or bill of lading. The liability imposed under this paragraph is for the actual loss or injury to the property caused by (1) the receiving carrier, (2) the delivering carrier, or (3) another carrier over whose line or route the property is transported in the United States or from a place in the United States to a place in an adjacent foreign country when transported under a through bill of lading and applies to property reconsigned or diverted under a tariff filed under subchapter IV of chapter 107 of this title. Failure to issue a receipt or bill of lading does not affect the liability of a carrier. A delivering carrier is deemed to be the carrier performing the line-haul transportation nearest the destination but does not include a carrier providing only a switching service at the destination.

* * *

49 U.S.C. §11706 (2000)

§ 11706. Liability of rail carriers under receipts and bills of lading

(a) A rail carrier providing transportation or service subject to the jurisdiction of the Board under this part shall issue a receipt or bill of lading for property it receives for transportation under this part. That rail carrier and any other carrier that delivers the property and is providing transportation or service subject to the jurisdiction of the Board under this part are liable to the person entitled to recover under the receipt or bill of lading. The liability imposed under this subsection is for the actual loss or injury to the property caused by—

(1) the receiving rail carrier;

(2) the delivering rail carrier; or

(3) another rail carrier over whose line or route the property is transported in the United States or from a place in the United States to a place in an adjacent foreign country when transported under a through bill of lading.

Failure to issue a receipt or bill of lading does not affect the liability of a rail carrier. A delivering rail carrier is deemed to be the rail carrier performing the line-haul transportation nearest the destination but does not include a rail carrier providing only a switching service at the destination.

* * *

AMICUS CURIAE BRIEF

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Nos. 08-1553 and 08-1554

In the Supreme Court of the United States

KAWASAKI KISEN KAISHA LTD., ET AL., PETITIONERS

v.

REGAL-BELOIT CORPORATION, ET AL.

UNION PACIFIC RAILROAD COMPANY, PETITIONER

v.

REGAL-BELOIT CORPORATION, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTIONS PRESENTED

The United States will answer the following questions:

1. Whether a forum-selection clause contained in an international "through" bill of lading for the carriage of goods from a non-adjacent foreign country to an inland point in the United States is unenforceable under the Carmack Amendment (Carmack), 49 U.S.C. 11706, 14706, where the through bill was issued by an ocean carrier that transported the goods by sea to a United States port and subcontracted with a rail carrier to conduct the inland portion of the transportation in the United States by railroad.

2. Whether a rail carrier that provides railroad transportation that the Surface Transportation Board has exempted from regulation under 49 U.S.C. 10502 may contract out of Carmack's requirements under 49 U.S.C. 10709.

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In the Supreme Court of the United States

No. 08-1553

KAWASAKI KISEN KAISHA LTD., ET AL., PETITIONERS

v.

REGAL-BELOIT CORPORATION, ET AL.

No. 08-1554

UNION PACIFIC RAILROAD COMPANY, PETITIONER

v.

REGAL-BELOIT CORPORATION, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

This case concerns a contract for the transportation of goods from a foreign country, which was performed by sea and rail carriage. The Federal Maritime Commission (FMC) and the Surface Transportation Board (STB) exercise regulatory authority over international maritime shipping and railroad transportation, respectively. The Department of Transportation is responsible for establishing the Nation's overall transportation pol-

icy. And the Department of State supervises the Nation's international commitments.

STATEMENT

A bill of lading is a contractual document that records a common carrier's receipt of goods from the party shipping them and states the terms of carriage. See *Norfolk S. Ry.* v. *James N. Kirby, Pty Ltd.*, 543 U.S. 14, 18-19 (2004) (*Kirby*). This case concerns a "through bill of lading" (through bill)—*i.e.*, a bill of lading issued by a carrier that does not itself intend to deliver the goods to their final destination and, instead, "contract[s] to carry to destination" at least in part "through the agency of other and independent carriers." See *Atlantic Coast Line R.R.* v. *Riverside Mills*, 219 U.S. 186, 187, 196-197 (1911). Multiple federal statutes have long regulated bills of lading in maritime and non-maritime contexts.

1. a. In 1893, Congress enacted the Harter Act, 46 U.S.C. 30701 *et seq.*, to regulate bill-of-lading provisions that had unduly "limit[ed] * * * the liability of [a] vessel and her owners." H.R. Rep. No. 2218, 74th Cong., 2d Sess. 7 (1936) (*1936 House Report*). That Act generally requires that water carriers "engaged in the carriage of goods to or from any port in the United States" issue a bill of lading upon request, prohibits certain contract terms affecting the carrier's liability, and establishes defenses to liability. 46 U.S.C. 30702-30706.

The Harter Act served as a model for the Hague Rules of 1921, which were adopted with minor modifications by international convention in 1924 "to establish uniform ocean bills of lading to govern the rights and liabilities of carriers and shippers *inter se* in international trade." *Robert C. Herd & Co.* v. *Krawill Mach.*

Corp., 359 U.S. 297, 301 & n.5 (1959); see International Convention for the Unification of Certain Rules Relating to Bills of Lading, *done* Aug. 25, 1924, 51 Stat. 233, 120 L.N.T.S. 155. In 1936, Congress implemented the Hague Rules by enacting the Carriage of Goods by Sea Act (COGSA), ch. 229, 49 Stat. 1207 (46 U.S.C. 30701 note).

COGSA requires, *inter alia*, that water carriers "issue to the shipper a bill of lading" with specified contents; "properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried"; and "exercise due diligence" to provide a seaworthy and properly manned, equipped, and supplied ship. COGSA § 3(1)-(3). COGSA defines carriers' rights and immunities with respect to "liabil[ity] for loss or damage"; prohibits contractual terms "relieving the carrier or the ship from liability for loss or damage" arising from certain forms of negligence; and requires shippers to give carriers notice of any loss or damage within three days of delivery and to bring suit within one year. COGSA §§ 3(6) and (8), 4.

COGSA "appl[ies] to all contracts for carriage of goods by sea * * * between the ports of the United States and ports of foreign countries," from "the time when the goods are loaded on to the time when they are discharged from the ship." COGSA §§ 1(e), 13. COGSA thus partially "supersede[d]" the Harter Act "in respect of foreign commerce by sea," S. Rep. No. 742, 74th Cong., 1st Sess. 5 (1935), but left "any other [applicable] law" operative in foreign commerce regarding "the duties, responsibilities, and liabilities of the ship or carrier" before "the goods are loaded" and "after the time they are discharged from the ship," COGSA § 12, and

left the Harter Act generally operative in domestic commerce. See COGSA § 13; *1936 House Report* 7.

Section 7 of COGSA states that COGSA does not "prevent a carrier or shipper from entering into any agreement * * * as to the responsibility and liability of the carrier or the ship" for loss or damage "prior to the loading on and subsequent to the discharge from the ship." COGSA § 7. Section 7 thus "gives the option of extending [certain COGSA terms] by contract" to cover "the entire period in which [goods] would be under [a carrier's] responsibility, including [a] period of inland transport" by an entity acting as an ocean carrier's agent in through transportation. *Kirby*, 543 U.S. at 29. International through bills thus frequently include what is known as a "Himalaya Clause" to permit "downstream parties expected to take part in the contract's execution [to] benefit from [COGSA's] liability limitations." See *id.* at 20 & n.2.

b. The FMC "regulates ocean shipping between the United States and foreign countries," *Landstar Express Am., Inc.* v. *FMC*, 569 F.3d 493, 494 (D.C. Cir. 2009), under the Shipping Act of 1984, 46 U.S.C. 40101 *et seq.*, which establishes a "regulatory process for the common carriage of goods by water in * * * foreign commerce." 46 U.S.C. 40101(1). The Shipping Act of 1984, *inter alia*, governs "through transportation" between "a United States port or point and a foreign port or point" by a "common carrier" that uses a "vessel operating on the high seas or the Great Lakes" for at least part of a through transportation to or from the United States, if that carrier holds itself out to the public as providing the transportation and "assumes responsibility" for the transportation from the "port or point of receipt" to "the port or point of destination." 46 U.S.C. 40102(6) and

(25). Such carriers must publish the "through rate" for each of their "through transportation route[s]," which must include (but need not separately state) any amount that the carrier pays "to an inland carrier for the inland portion of [the] through transportation." 46 U.S.C. 40102(11) and (24), 40501(a)(1).

2. a. Congress's regulation of land-based bills of lading, like its water-based counterpart, responded to carrier practices in the 19th and early 20th centuries. To avoid liability for damage to goods occurring on others' lines during through transportation, rail carriers adopted the "practice * * * of refusing to make a specific agreement to transport to points beyond [their] own line[s]." *Riverside Mills*, 219 U.S. at 199-200. That practice imposed upon shippers seeking compensation for lost or damaged goods "the difficult, and often impossible, task, of determining on which of the several connecting lines the damage occurred." *Missouri, Kan. & Tex. Ry.* v. *Ward*, 244 U.S. 383, 387 (1917). Carriers additionally employed contractual terms in bills of lading limiting their liability and restricting the time within which shippers could present claims. *Cummins Amendment*, 33 I.C.C. 682, 683, 686-687, 690-691 (1915); H.R. Rep. No. 1341, 63d Cong., 3d Sess. 1-2 (1915).

In 1906, Congress amended the Interstate Commerce Act (ICA), ch. 104, 24 Stat. 379, by enacting the Carmack Amendment (Carmack) to impose on "the initial carrier unity of responsibility for the [entire] transportation," *Ward*, 244 U.S. at 386, when "receiving property for transportation from a point in one State to a point in another State." Carmack, ch. 3591, § 7, 34 Stat. 595. In 1915, Congress extended Carmack to the transportation of property "from any point in the United States to a point in an adjacent foreign country." In

1927, Congress extended liability under Carmack to include not only the initial ("receiving") carrier as under prior law, but also the carrier "delivering" the goods "nearest to the point of destination." See 49 U.S.C. 20(11) (1976). In 1920, 1927, and 1940, Congress further revised Carmack to address circumstances in which property is damaged during transit while "in the custody of a carrier by water," providing that both "the liability of [the water] carrier" and the "liability of the initial or delivering carrier" "shall be determined by the bill of lading of the carrier by water and by and under the laws and regulations applicable to transportation by water." *Ibid.* Carmack is now codified at 49 U.S.C. 11706 and 14706.[1]

Under Carmack, a "rail carrier providing transportation or service subject to the jurisdiction of the [STB] under [Part A of Subtitle IV of Title 49] shall issue a receipt or bill of lading for property it receives for transportation under [Part A]." 49 U.S.C. 11706(a). Both that receiving rail carrier and the carrier that "delivers the property" are "liable to the person entitled to recover under the receipt or bill of lading" for "the actual loss or injury to the property" caused either by "the receiving rail carrier," the "delivering rail carrier," or "another rail carrier over whose line or route the prop-

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[1] Carmack was enacted as Paragraphs 11 and 12 of Section 20 of the ICA. See 49 U.S.C. 20(11) and (12) (1976). Congress extended Carmack to motor carriers (in 1935) and freight forwarders (in 1942) when it brought such transportation under the ICA. See 49 U.S.C. 319, 1013 (1976). In 1978, Congress enacted the relevant portion of Title 49 into positive law and placed Carmack in 49 U.S.C. 10730 and 11707 (1994). In 1995, Carmack's provisions were moved to 49 U.S.C. 11706 (rail carriers) and 14706 (motor carriers, freight forwarders, and water carriers).

erty is transported in the United States or from a place in the United States to a place in an adjacent foreign country when transported under a through bill of lading." *Ibid.*[2]

Carmack provides that a "rail carrier may not limit or be exempt from [such] liability" except as provided in Section 11706(c)(2) or (3), and states that any provision in a "receipt, bill of lading, contract, or rule" that constitutes a "limitation of liability or of the amount of recovery * * * is void." 49 U.S.C. 11706(c)(1). Carmack similarly prohibits a rail carrier from providing by "contract" or otherwise "a period of less than 9 months for filing a claim against it" and "a period of less than 2 years for bringing a civil action." 49 U.S.C. 11706(e). Finally, and of particular significance in this case, Carmack specifies that a "civil action" under Carmack "may only be brought" against a rail carrier in certain federal district courts or state courts. 49 U.S.C. 11706(d)(2).

b. The STB, which replaced the Interstate Commerce Commission (ICC) in 1996, regulates "rail carriers" under Part A of Subtitle IV of Title 49, 49 U.S.C. 10101-11908. See 49 U.S.C. 10501-10502. Regulated rail carriers must, *inter alia*, provide transportation subject to STB Part-A jurisdiction "on reasonable request" at reasonable rates (to the extent required by 49 U.S.C. 10707(b)) and reasonable terms. 49 U.S.C. 10702, 11101(a) and (e). However, "rail carriers providing transportation subject to [Part-A] jurisdiction" are sepa-

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[2] If a shipper proves a *prima facie* case under Carmack by showing that the initial carrier received the property "in good condition," carriers have limited defenses to liability. *Missouri Pac. R.R.* v. *Elmore & Stahl*, 377 U.S. 134, 137-138 (1964). If the receiving or the delivering carrier is held liable, it is "entitled to recover from the rail carrier over whose line or route the loss or injury occurred." 49 U.S.C. 11706(b).

rately authorized to enter into contracts to provide rail services. 49 U.S.C. 10709(a). "A contract that is authorized by [Section 10709], and transportation under such contract," are "not subject to [Part A]," and a contracting party "shall have no duty in connection with the services provided under the contract other than those duties specified by * * * the contract." 49 U.S.C. 10709(b) and (c)(1). This provision effectively allows a carrier and shipper to avoid regulation (including Carmack) by contractual agreement.

In addition, the STB may exempt a rail carrier or a type of transportation or service from "the application in whole or in part of" Part A of Subtitle IV. 49 U.S.C. 10502(a). That authority specifically includes the power to "exempt transportation that is provided by a rail carrier as part of a continuous intermodal movement." 49 U.S.C. 10502(f). Invoking that authority, the agency "exempt[ed] from the requirements" of Part A any trailer-on-flatcar and container-on-flatcar service provided by a rail carrier "as part of a continuous intermodal freight movement." 49 C.F.R. 1090.2. No exemption, however, may "operate to relieve any rail carrier from an obligation to provide contractual terms for liability and claims which are consistent with the provisions of [S]ection 11706," *i.e.*, Carmack. 49 U.S.C. 10502(e).

3. a. Respondents are cargo owners that contracted with petitioner Kawasaki Kisen Kaisha, Ltd. (K-Line) for the through transportation of goods from China to destinations in the Midwestern United States. Pet. App. 2a & n.1.[3] K-Line issued through bills of lading to each

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[3] Because the insurer respondents are subrogated to insured cargo owners that contracted with K-Line, we refer to all respondents as if

shipper. Those bills authorized K-Line to subcontract the carriage "on any terms whatsoever"; designated COGSA as the law governing the carriers' responsibility during the "entire" carriage; and included a Himalaya Clause permitting each subcontractor to "have the benefit of all provisions" of each bill. *Id.* at 2a, 6a-7a. Each bill also stated that "any action [under the bill] or in connection with Carriage of Goods shall be brought before the Tokyo District Court in Japan, to whose jurisdiction [the shipper] irrevocably consents." *Id.* at 5a.

K-Line used its own ocean vessel to transport respondents' goods from China to Long Beach, California, and, through its United States agent, subcontracted with petitioner Union Pacific Railroad for inland transportation to the ultimate destinations. Pet. App. 3a. It is undisputed that the rail transportation had been exempted from Part-A regulation under the exemption for continuous intermodal freight movement. *Id.* at 27a-28a. The contract between K-Line and Union Pacific incorporated terms from Union Pacific's "Master Intermodal Transportation Agreement" (MITA), including a provision stating that the contract was "made under 49 U.S.C. § 10709." *Id.* at 7a.

b. Respondents filed separate lawsuits in state court, alleging that their property was damaged in a train derailment while en route to the Midwest. Pet. App. 7a. The lawsuits were removed to district court, which dismissed the actions based on the Tokyo forum-selection clause in each through bill. *Id.* at 36a-47a.

c. The Ninth Circuit reversed and remanded. Pet. App. 1a-35a. The court first held that Carmack, rather

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they are cargo owners. All references to "Pet. App." are to the petition appendix in No. 08-1553.

than COGSA, governed K-Line's bills of lading. *Id.* at 11a-26a. It reasoned that, although Carmack "[b]y its terms" applies to a "rail carrier providing transportation or service subject to the [STB's Part-A] jurisdiction," an "ocean carrier" such as K-Line may qualify as a "rail carrier." *Id.* at 12a-13a, 16a (quoting 49 U.S.C. 11706(a)).

The court further held that Carmack applies to the inland portion of import shipments from a foreign country on a through bill of lading issued overseas. Pet. App. 17a-19a. Relying on Ninth Circuit precedent, the court found "Carmack's reach [to be] coextensive with the [STB's] jurisdiction." *Id.* at 18a. That conclusion, the court explained, was not altered by the parties' "contractual extension of COGSA" to the inland portion of the transit. *Id.* at 19a-26a. The court reasoned that while Section 7 of COGSA does not prevent the parties from "extending COGSA's protections" to transportation occurring after goods are discharged from a ship, "other law"—specifically Carmack—might negate such an extension. *Id.* at 21a-22a, 25a; see COGSA § 12.

The court of appeals recognized that Carmack's default rules may be displaced under 49 U.S.C. 10502(e) or 10709. Pet. App. 26a-35a. Section 10502(e) applies to "exempt" railroad transportation like that at issue here and permits rail carriers to "offer[] alternative terms" for such transportation, but the court held that a carrier may do so only if it "first offer[s] the shipper the option of full Carmack protections, presumably at a higher rate." *Id.* at 28a (citation omitted). The court found the record insufficient to determine whether K-Line offered such terms to respondents. *Id.* at 33a-35a.

The court held that K-Line and Union Pacific could not enter into a contract for railroad transportation un-

der Section 10709, which removes such contracts from Part-A requirements. Pet. App. 29a-33a. The court reasoned that Section 10709's contracting provisions apply to "transportation subject to [STB] jurisdiction," 49 U.S.C. 10709(a), and permit "agreement[s] for nonexempt transportation"; but that where, as here, the STB has exempted transportation from Subtitle IV of Title 49, the Subtitle's provisions, "includ[ing] § 10709," are inapplicable. Pet. App. 29a, 32a.

4. In September 2009, the United States became a signatory to the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (the Rotterdam Rules), G.A. Res. 63/122, Annex, U.N. Doc. A/RES/63/122 (Dec. 11, 2008). If ratified by the President with the advice and consent of the Senate, the Rotterdam Rules would alter the liability regime for international through transportation involving the United States when the transportation is partly by sea and partly by land. See *id.* at 8-11 (Arts. 12, 17, 18(d)).

SUMMARY OF ARGUMENT

1. The Ninth Circuit erred in concluding that Carmack displaces the Tokyo forum-selection provision in K-Line's through bills of lading.

a. Carmack does not apply to import carriage from non-adjacent foreign countries. Carmack's purpose is to impose upon the initial or delivering carrier responsibility for damage caused by any connecting carrier that participates in the transportation of that property. Carmack's text expressly limits that liability to transportation within the United States or "*from* a place in the United States *to* a place in an *adjacent* foreign country." 49 U.S.C. 11706(a)(3) (emphasis added). That language

reflects the longstanding limitations on Carmack's scope.

In 1915, Congress expanded Carmack beyond wholly domestic transportation to reach transportation "from" the United States "to" an "adjacent foreign country." See 49 U.S.C. 20(11) (1976). The ICC promptly determined that Carmack did not apply to through carriage to or from *non-adjacent* foreign countries, an interpretation that became a fixture in the Nation's foreign commerce over the ensuing decades. The ICC and the courts similarly long ago concluded that Carmack does not apply to through import transportation originating in even adjacent foreign countries. That limitation reflects concerns for comity with neighboring nations and reflects cooperative practices of the ICC and Canadian regulators before 1915. Carmack's limited scope was not altered when Congress enacted the ICA into positive law, expressly without substantive change, in 1978.

b. In any event, Carmack does not govern the through transportation in this case because Carmack governs transportation by a "rail carrier." K-Line is an ocean carrier, not a rail carrier. A "rail carrier" is a person that "provid[es] common carrier railroad transportation for compensation," 49 U.S.C. 10102(5), by conducting rail operations. An ocean carrier like K-Line that subcontracts with a rail carrier for railroad transportation performs a function fundamentally different from that of the rail carrier actually providing the transportation. The Ninth Circuit's holding that an ocean carrier becomes a "rail carrier" by subcontracting for railroad transportation to complete the inland leg of international through transportation would substantially disrupt the regulatory regime.

c. Because Carmack does not apply to K-Line's bill-of-lading obligations, it does not govern any part of the international through transportation in this case. Carmack's animating purpose is to create in the initial and delivering carriers unity of responsibility for the entire transportation. It does not apply when the initial carrier is an ocean carrier that contracts for through transportation from overseas points to inland destinations. Thus, Carmack does not render unlawful the forum-selection clause in K-Line's bills of lading.

2. If the Court nonetheless concludes that Carmack applies to the international through transportation here, the Ninth Circuit correctly concluded that a rail carrier like Union Pacific engaged in rail transportation exempted from regulation under 49 U.S.C. 10502 cannot be relieved from all Carmack obligations by executing a contract for rail transportation under 49 U.S.C. 10709. Union Pacific cannot rely on Section 10709 in this case because the STB's exemption of intermodal carriage rendered Part A, which includes Section 10709, inapplicable. Union Pacific, however, complied with whatever Carmack obligations it had by offering K-Line the option of Carmack-compliant terms. For that reason as well, the Ninth Circuit's judgment should be reversed.

ARGUMENT

I. THE CARMACK AMENDMENT DOES NOT PRECLUDE ENFORCEMENT OF THE FORUM-SELECTION CLAUSE IN K-LINE'S THROUGH BILLS OF LADING

A. Carmack Does Not Apply Either To Carriage Between The United States And Non-Adjacent Foreign Countries Or To Imports From Any Foreign Country

Carmack's current text reflects the longstanding limitations on Carmack's scope. Congress initially ap-

plied Carmack to transportation between points within the United States—*i.e.*, wholly interstate transportation. In 1915, Congress enacted a limited extension of Carmack into foreign commerce, applying it to common carriers "subject to the provisions of [the ICA] receiving property for transportation * * * *from* any point in the United States *to* a point in an *adjacent* foreign country." 49 U.S.C. 20(11) (1976) (emphasis added); Act of Mar. 4, 1915, ch. 176, § 1, 38 Stat. 1197. That text plainly excluded both carriage between points in the United States and *non*-adjacent foreign countries and imports from all foreign countries. The ICC and courts have long recognized those restrictions, and Congress has not since altered Carmack's geographic reach.

1. a. Two months after Congress amended Carmack in 1915, the ICC concluded that Carmack's text demonstrated that it did not apply to "export and import shipments to and from foreign countries not adjacent to the United States." *Cummins Amendment*, 33 I.C.C. 682, 693 (1915). The Commission carried that interpretation forward in 1919, when it "prescribed uniform forms of bills of lading" for rail carriers. See *Illinois Steel Co.* v. *Baltimore & Ohio R.R.*, 320 U.S. 508, 509-510 (1944) (citing *Bills of Lading*, 52 I.C.C. 671 (1919)). In addition to prescribing a uniform domestic through bill, the ICC prescribed a uniform "through bill[] of lading" for regulated carriers that joined with ocean carriers in conducting export through transportation "to nonadjacent foreign countries." *Bills of Lading*, 52 I.C.C. at 726-727.[4]

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[4] The "through bill of lading" was actually a "divisible bill" constituting a rail-carrier bill for carriage to the port (which was "not a contract * * * for shipment beyond") and an ocean-carrier bill for carriage from that port. *Great N. Ry.* v. *Sullivan*, 294 U.S. 458, 460-461 n.2 (1935) (citation omitted); see *Bills of Lading*, 52 I.C.C. at 730; cf.

The export bill included a provision limiting each carrier's liability to loss or damage "occurring on its own road or its own water line or its portion of the through route" before the "property has been delivered to the next carrier" during "the inland service to the port of export." *Id.* at 690, 731. The ICC explained that the "essential character" of such inland transportation on an international through route is "that of 'foreign commerce'" and found it "evident" from the statutory text that Congress did not "inten[d] * * * to make [Carmack] applicable to traffic to a nonadjacent foreign country." *Id.* at 683, 729 (citation omitted). The Commission accordingly held that Carmack did not displace the carriers' "common law right" to insist on a liability-limiting contractual provision for their "inland service to the port of export" while en route to "non-adjacent foreign countries." *Id.* at 690, 732.

In the Transportation Act, 1920, ch. 91, § 441, 41 Stat. 497, Congress confirmed the ICC's authority to "prescribe the form of [the] through bill of lading" and established procedures to facilitate export through transportation to overseas foreign countries. See 49 U.S.C. 25 (1934) (repealed 1940); cf. *United States* v. *Alaska S.S. Co.*, 253 U.S. 113 (1920). Consistent with the ICC's order, Congress also directed that no rail carrier shall "be liable [for] * * * the shipment after its delivery to the vessel." 49 U.S.C. 25(4) (1934) (repealed 1940).

The ICC promptly revised its "through export bill of lading for shipments to nonadjacent foreign countries"; "adhere[d]" to its conclusion that Carmack does not ap-

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Pennsylvania v. *ICC*, 561 F.2d 278, 281-285 (D.C. Cir. 1977) (discussing ICC policy governing international through rates based on combination rates for inland and ocean carriage from 1906 to 1976).

ply to the inland portion of such shipments; and prescribed a uniform through bill which included the same provision limiting a carrier's liability to loss or damage "occurring on * * * its portion of the [inland] through route" to the port of export. *Export Bill of Lading*, 64 I.C.C. 347, 351, 354 (1921); *id.* App. D (Pt. I, § 2(b)). That uniform bill of lading was required for use in the United States for the ensuing four decades, and its premise that Carmack did not apply to the inland leg of through transportation to non-adjacent foreign countries thus became a fixture in the Nation's foreign commerce. See 49 C.F.R. 31.4, 31.6 (1963); 49 C.F.R. 31.13 (1938) (uniform export bill). Although the ICC in 1966 rescinded the regulation that made use of its uniform export bill mandatory, see 31 Fed. Reg. 14,945 (1966), the ICC did not alter its interpretation of Carmack reflected in the uniform bill.[5]

Like the ICC, this Court concluded that Carmack "does not apply" to "bills of lading affecting liability of railroads for loss of property" during "an interstate in-

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[5] The ICC's uniform "domestic" bill of lading remained applicable to interstate carriage and export carriage "to points in adjacent foreign countries," *Domestic Bill of Lading & Live Stock Contract*, 64 I.C.C. 357, 364 (1921), and did not contain provisions limiting carrier liability in a manner prohibited by Carmack, *Bills of Lading*, 52 I.C.C. at 708-711. See 49 C.F.R. 1035.1(c) (1992) (prescribing uniform bill when a bill is "required" under ICA § 20, 49 U.S.C. 20 (1976)); 49 C.F.R. 31.1(b) (1938) (same).

In 1993, the ICC revised its domestic-bill-of-lading regulations to "clarify the[ir] terms" and "remove obsolete references." 58 Fed. Reg. 60,797 (1993); see 49 C.F.R. 1035.1(a). The ICC emphasized that this revision does "not affect[]" Carmack's bill-of-lading provisions, which apply to goods carried between United States points or "exported to adjacent foreign countries." *Bills of Lading*, 9 I.C.C.2d 1137, 1139-1140 nn.5-6 (1993) (citing ICC precedent).

land route to a seaport * * * for ocean carriage to a non-adjacent foreign country." *Missouri Pac. R.R.* v. *Porter*, 273 U.S. 341, 345 (1927). That limitation, *Porter* explained, constrained Carmack's reach but did not restrict the ICC's broader jurisdiction to regulate bills of lading (to ensure "just and reasonable" terms) for "all carriers" and "all transportation subject to the Act." *Ibid.* (holding that ICC's authority preempted state law).

b. Carmack has long embodied another restriction on its application: even with respect to adjacent countries, Carmack only applies to transportation *to*, not *from*, such countries.

"For reasons of international comity, regulation of carriers in foreign commerce has often been less stringent than that of carriers in domestic commerce." *Trailer Marine Transp. Corp.* v. *FMC*, 602 F.2d 379, 397 n.77 (D.C. Cir. 1979) (citing *United States* v. *Pennsylvania R.R.*, 323 U.S. 612, 621-622 (1945)). And, although Congress has authority to regulate the issuance of bills of lading in foreign countries and liability of carriers for carriage of property to the United States, see *Knott* v. *Botany Mills*, 179 U.S. 69, 74-75 (1900), Congress decided not to do so in Carmack.

Such an application of authority would risk intruding upon the regulatory prerogatives of neighboring nations, which might similarly attempt to exercise their authority over commerce originating in the United States, all in derogation of the inter-sovereign cooperation that is often essential to productive trade partnerships. Indeed, before Congress extended Carmack to carriage "from" the United States "to" adjacent foreign countries in 1915, the ICC and its Canadian counterpart had developed an "efficient working arrangement" based on

the understanding that Canadian authorities would regulate rates for transportation from Canada to the United States and the ICC would regulate exports from the United States to Canada. See *Heated Car Serv. Regulations*, 50 I.C.C. 620, 622-623 (1918); *International Paper Co.*, 33 I.C.C. 270, 274-275 (1915). That arrangement presumably influenced Congress's choice to honor the regulatory authority of adjacent foreign countries by limiting Carmack's reach in foreign commerce to export traffic.

The Second Circuit in *Sompo* incorrectly concluded that Carmack covers both import and export traffic with foreign countries. See *Sompo Japan Ins. Co. of Am.* v. *Union Pac. R.R.*, 456 F.3d 54, 64-68 (2d Cir. 2006); cf. Pet. App. 18 (citing *Sompo*). *Sompo* reasoned that Carmack's text before its codification in 1978 (see pp. 13-14, *supra*) covered such traffic because that text should be construed in the same way as similar "'from . . . to' language" in Section 1 of the ICA, which *Galveston, Harrisburg, & San Antonio Railway* v. *Woodbury*, 254 U.S. 357 (1920), interpreted as vesting "the ICC [with] jurisdiction over transportation in foreign commerce *regardless* of whether the transportation originated in the United States." 456 F.3d at 65-66. *Sompo* misread *Woodbury*.

Woodbury addressed whether the ICA applied when luggage was lost on the inbound portion of round-trip transportation between Canada and Texas. At the relevant time (1917), Section 1 of the ICA stated that the ICA applied to "any *common carrier* . . . engaged in the transportation of passengers or property . . . from any place in the United States to an adjacent foreign country." *Woodbury*, 254 U.S. at 359 (citation omitted). The Court reasoned that the textual focus on the carrier

meant that the ICA's application turned on "the field of the carrier's operation" and "not the direction of the movement." *Id.* at 359-360. A carrier regulated by the ICA because it is "engaged in transportation by rail *to* an adjacent foreign country," the Court explained, also is normally "engaged in transportation * * * *from* that country to the United States," and, for that reason, tariffs filed pursuant to the ICA governed the carrier's liability notwithstanding that the loss occurred during transportation from an adjacent foreign country. *Ibid.*

Carmack's structure was fundamentally different and more limited. It contained two distinct conditions for its application: The initial carrier had to be "subject to the provisions of [the ICA]," and it had to "receiv[e] property for transportation" (as relevant here) "from any point in the United States to a point in an adjacent foreign country." 49 U.S.C. 20(11) (1976). The first requirement, like *Woodbury*, focused on the type of carrier and its field of operations. But the second turned on the direction of the specific "transportation" at issue. *Woodbury*'s carrier-focused rationale did not speak to the latter inquiry, which unambiguously limited Carmack to export transportation.

The courts that addressed the question before 1978 thus were nearly uniform in concluding that imports did not qualify as transportation "from" the United States "to" an adjacent foreign country under Carmack, and that *Woodbury* did not resolve the question. See *Alwine* v. *Pennsylvania R.R.*, 15 A.2d 507, 511-513 (Pa. Super. Ct. 1940); see also, *e.g.*, *Sklaroff* v. *Pennsylvania R.R.*, 184 F.2d 575, 575 (3d Cir. 1950) (per curiam) (following *Alwine*); *Strachman* v. *Palmer*, 177 F.2d 427, 429 (1st Cir. 1949) (same); *Reider* v. *Thompson*, 176 F.2d 13, 15 (5th Cir. 1949) (same), rev'd on other grounds, 339 U.S.

113 (1950). But see *Goldburg* v. *Delaware, Lackawanna & W. R.R.*, 40 N.Y.S.2d 44, 46-48 (Mun. Ct. 1943). The ICC had likewise long held that Carmack does not govern import carriage "from points in an adjacent foreign country to points in the United States," *Heated Car Serv. Regulations*, 50 I.C.C. at 623.

In *Reider* v. *Thompson*, 339 U.S. 113 (1950), the Court addressed Carmack's application to the land portion of the transit of goods shipped from Argentina to New Orleans by ocean carrier and then by rail from New Orleans to Boston. The Court noted that "[t]here was no through bill of lading from Buenos Aires to Boston"; rather, "[t]he contract for ocean transportation terminated at New Orleans," and there was a "new, separate, and distinct domestic contract of carriage" and distinct domestic bill of lading for the land transportation to Boston. *Id.* at 117. In those circumstances, the Court concluded that the discussion of Carmack in *Porter* did not control, *id.* at 116 n.1, and held that Carmack applied to the land transportation. The Court emphasized, however, that it did "not * * * determine" whether a domestic transportation of goods imported under a "*through* bill of lading" would be subject to Carmack. *Id.* at 117-118 (discussing *Alwine*).

c. In 1978, Congress reenacted the ICA into positive law against the long interpretive history described above. Act of Oct. 17, 1978 (ICA Codification), Pub. L. No. 95-473, § 1, 92 Stat. 1337. Carmack's revised text states in its first sentence that it applies to a rail carrier providing "transportation or service subject to the juris-

diction of" the STB under Part A[6] when the carrier receives property for transportation under Part A. 49 U.S.C. 11706(a). Although that sentence omits the phrase "adjacent foreign country," 49 U.S.C. 20(11) (1976), that omission does not alter the longstanding rule that Carmack does not govern transportation between places in the United States and *non*-adjacent foreign countries or *imports* from any country.

To the contrary, Section 11706(a) as a whole demonstrates that that limitation was retained. Carmack establishes "unity of responsibility for the transportation to destination," *Missouri, Kan. & Tex. Ry.* v. *Ward*, 244 U.S. 383, 386-387 (1917), by making the initial carrier (and now the delivering carrier) liable for damages "caused by it or any other carrier in the course of the transportation." *Northern Pac. Ry.* v. *Wall*, 241 U.S. 87, 92 (1916); accord *Atlantic Coast Line R.R.* v. *Riverside Mills*, 219 U.S. 186, 206-207 (1911). Carmack expressly provides, however, that the receiving and delivering carriers' liability for damage caused by a connecting carrier attaches only to transportation "*in* the United States or *from* a place in the United States *to* a place in an *adjacent* foreign country." 49 U.S.C. 11706(a)(3) (emphases added). That textual limitation, when read in light of Carmack's purpose, reflects Congress's continued intent to restrict Carmack to the carriage of goods between places in the United States and for export to an adjacent foreign country.

Any doubt on this score is dispelled by the terms of the 1978 codification itself. Courts do not "infer[] that Congress, in revising and consolidating the laws, in-

[6] Part-A jurisdiction encompasses certain transportation in the United States "between" a place in "the United States and a place in a foreign country." 49 U.S.C. 10501(a)(1)(B) and (2)(F).

tend[s] to change their effect, unless such intention is clearly expressed." *Fourco Glass Co.* v. *Transmirra Prods. Corp.*, 353 U.S. 222, 227 (1957); see *John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130, 135-136 (2008). And here, Congress specifically directed in the ICA codification statute itself that the revised text "may not be construed as making a substantive change in the law[]." ICA Codification § 3(a), 92 Stat. 1466; see *Burlington N. R.R.* v. *Oklahoma Tax Comm'n*, 481 U.S. 454, 457 n.1 (1987).

The legislative history similarly emphasized that the revision "makes no substantive change in the law," explained that courts would construe the "codification statute" accordingly, and concluded that the revision would not "impair the precedent value of earlier judicial decisions and other interpretations." H.R. Rep. No. 1395, 95th Cong., 2d Sess. 9-10, 195-196, 213 (1978); see *id.* at 8 (Law Revision Counsel's explanation that, "[e]ven if the language used in the codification *appears* to make a substantive change, the courts will look to the predecessor statute and legislative history" to interpret the codification).

The Ninth Circuit ignored the text of Section 11706(a)(3) quoted above and the terms of the 1978 codification making clear that it effected no substantive change. See Pet. App. 17a-18a; *Neptune Orient Lines, Ltd.* v. *Burlington N. & Santa Fe Ry.*, 213 F.3d 1118, 1119 (9th Cir. 2000). Even the Second Circuit decision cited by the panel (Pet. App. 18a) recognized that Congress "intended to leave the law substantively unchanged" and implied that the omission of the phrase "*adjacent* foreign country" in the first sentence of Section 11706(a) should not alter Carmack's reach. *Sompo*,

456 F.3d at 64, 68 n.13.[7] Read correctly, in light of its long history, Carmack does not apply to transportation between places in the United States and non-adjacent foreign countries of the kind at issue here.

B. K-Line Is A Water Carrier In Foreign Commerce, Not A "Rail Carrier" Subject To Carmack

Even if Carmack applied to import transportation from non-adjacent foreign countries, K-Line is an ocean common carrier rather than a "rail carrier providing transportation or service subject to the [STB's] jurisdiction" and therefore is not subject to Carmack. 49 U.S.C. 11706(a).

A "rail carrier" is "a person providing common carrier railroad transportation for compensation." 49 U.S.C. 10102(5). "Rail carriers" have long been understood as limited to entities that themselves "conduct rail operations" and hold themselves out to the public as providing such transportation. See, *e.g.*, *Association of P&C Dock Longshoremen*, 8 I.C.C.2d 280, 290 & n.21 (1992) (citing cases); see also, *e.g.*, *United States* v. *California*, 297 U.S. 175, 181-183 (1936) (status as common carrier by rail turns on whether entity provides "rail transportation," the "essential elements" of which are "the receipt and transportation, for the public, for hire, of [rail] cars"); *Rexroth Hydraudyne B.V.* v. *Ocean World Lines, Inc.*, 547 F.3d 351, 363-364 (2d Cir. 2008) (discussing cases); *American Orient Express Ry.* v. *STB*, 484 F.3d 554, 556-557 (D.C. Cir. 2007).

That understanding is reflected in the ICA's illustrative definition of "transportation," which "includes"

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[7] *Sompo* nevertheless "f[ou]nd [it]sel[f] [b]ound" by circuit precedent that failed to address Carmack's original text. 456 F.3d at 68 n.13 (citing *Project Hope* v. *M/V IBN SINA*, 250 F.3d 67, 74-75 (2d Cir. 2001)).

items "related to the movement of passengers or property" (*e.g.*, locomotives, vehicles, vessels) and "services related to that movement." 49 U.S.C. 10102(9). A person providing "railroad transportation" is thus most naturally understood to be an entity that has "some form of direct involvement in the movement of passengers or property" by railroad. *Rexroth*, 547 F.3d at 362.[8]

In contrast, an ocean common carrier that contracts with a connecting rail carrier to carry goods on an inland route "perform[s] a function that is fundamentally different from that of a rail carrier that actually does the transporting." *Rexroth*, 547 F.3d at 362. Indeed, as *Rexroth* explains (*ibid.*), the Ninth Circuit's contrary approach would create tension within the ICA's statutory scheme. The ICA regulates, *inter alia*, transportation by a "freight forwarder," which the ICA defines in pertinent part as "a person holding itself out to the general public (other than as a * * * rail * * * carrier) to provide transportation of property" by using ICA-regulated carriers in the ordinary course to provide "any part of the transportation." 49 U.S.C. 13102(8). If contracting for rail services would transform a freight forwarder into a "rail carrier," a freight forwarder that uses a rail carrier to provide transportation presumably could not hold itself out as something other than a "rail carrier."

The Ninth Circuit found it significant that the STB has jurisdiction over "transportation by a rail carrier" "by railroad and water" when under an "arrangement for a continuous carriage or shipment," 49 U.S.C. 10501(a)(1). See Pet. App. 13a, 16a. That provision,

[8] The ICA's definition of "railroad" includes various items "used by or in connection with a railroad," such as a bridge or intermodal equipment. 49 U.S.C. 10102(6).

however, in fact undermines the court's holding. The current version of this provision gives the STB Part-A jurisdiction only over a "rail carrier" engaged in such transportation. 49 U.S.C. 10501(a)(1). And the prior (pre-1995) version makes clear that a "rail carrier" is indeed only a rail carrier, because it gave the agency jurisdiction over *both* a "rail carrier" and a "water common carrier" when they participated in such a joint transportation arrangement. 49 U.S.C. 10501(a)(1) (1994); see 49 U.S.C. 1(1)(a) (1976); see *ICC* v. *Goodrich Transit Co.*, 224 U.S. 194, 207-209 (1912) (explaining that under the prior version of the statute "carriers by water" were subject to ICA regulation "when engaged in carrying on traffic under joint rates with railroads"); *Trailer Marine Trans. Corp.*, 602 F.2d at 383-386. Indeed, Congress continues to distinguish between rail carriers and water carriers in a variety of contexts. Compare 49 U.S.C. 10703 (requiring regulated "[r]ail carriers" to "establish through routes * * * with water carriers") with 49 U.S.C. 13102(26), 13521(a)(1) and (b), 13701(a)(1)(B) (STB's Part-B jurisdiction over water carriers and through routes).[9]

The Ninth Circuit's holding that an oceangoing "water carrier" is a "rail carrier" subject to STB jurisdiction under 49 U.S.C. 10501(a)(1)(B) would substantially dis-

[9] The distinction between rail and water carriers is longstanding. For instance, after the ICC concluded in 1919 that Carmack prohibited domestic water carriers participating in rail-water through transportation from using bill-of-lading provisions limiting their liability as permitted under maritime law, *Bills of Lading*, 52 I.C.C. at 723-726, Congress amended Carmack to provide that the liability of a "carrier by water" for damage caused "while [property] is in [its] custody" is governed by laws "applicable to transportation by water." Transportation Act, 1920, ch. 91, § 437, 41 Stat. 494 (49 U.S.C. 14706(c)(2)); see 49 U.S.C. 11707(c)(2) (1994).

rupt Congress's regulatory regime. The Shipping Act of 1984 specifically contemplates FMC regulation of ocean carriers that use through routes with rail carriers, see pp. 4-5, *supra*; *Rexroth*, 547 F.3d at 357, and both the ICC and the FMC have determined that an ocean carrier providing international "through transportation with inland carriers" remains solely under the FMC's regulatory authority. See 46 C.F.R. 520.1(a); *Improvement of TOFC/COFC Regulations*, 3 I.C.C.2d 869, 883 (1987) (FMC regulates tariffs of ocean carriers providing container service with rail transportation). If an "ocean carrier" is a "rail carrier," as the Ninth Circuit held, the STB's authority would significantly expand and the FMC's continuing authority to regulate water carriers in this through-carriage context would be in doubt, because the STB's jurisdiction over "transportation by rail carriers * * * is exclusive," 49 U.S.C. 10501(b).

C. Carmack Does Not Apply To Union Pacific Because K-Line's Bill Of Lading Governs The Entire Through Transportation

Because Carmack does not apply to K-Line's bill of lading for international through transportation, it imposes no obligation on Union Pacific or any other connecting carrier that subcontracted with K-Line to perform part of that transportation.

Carmack's text reflects that the initial carrier has a duty to issue a single bill of lading that will govern the entire through transportation. It provides that a rail carrier "shall issue a receipt or bill of lading for property it receives for transportation"; specifies that "[t]hat rail carrier" is "liable to the person entitled to recover under *the* receipt or bill of lading"; renders the carrier liable for property damage caused by it, "the delivering

carrier," or "another rail carrier" over whose line the property was transported; and entitles "[*t*]*he* rail carrier issuing *the* receipt or bill of lading" to recover from the carrier causing the loss. 49 U.S.C. 11706(a) and (b) (emphases added).

That focus on "the" bill of lading issued by the receiving rail carrier is also reflected in this Court's decisions, which explain that Carmack "requires the receiving carrier to issue a through bill of lading," *St. Louis, Iron Mountain & S. Ry.* v. *Starbird*, 243 U.S. 592, 595, 604 (1917), and thereby makes "the receiving carrier * * * responsible for the whole carriage," *Ward*, 244 U.S. at 387. Carmack's purpose is "to create in the initial carrier unity of responsibility for the transportation to destination" by treating the carriers participating in that transportation "as one system" in which all connecting carriers "become in effect mere agents, whose duty it is to forward the goods under the terms of the contract made by their principal, the initial carrier." *Id.* at 386-388; accord *Wall*, 241 U.S. at 92.[10] Although Carmack now also imposes liability on the delivering carrier, its focus remains on the single course of transportation under the single through bill of lading.

It follows that "[t]he bill of lading, required to be issued by the initial carrier * * * , 'governs the entire

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[10] That approach reflected the standard industry practice underlying through transportation whereby "[t]he receiving carrier makes the rate and the route" by selecting "connecting carriers" to build a continuous route to destination. *Riverside Mills*, 219 U.S. at 199. Congress understood that "the initial carrier [would have] a through route connection with the secondary carrier" and, if held liable under Carmack, could easily obtain reimbursement from the carrier responsible for the damage because both of their businesses would depend on continued cooperation. *Id.* at 200-201 (quoting legislative history).

transportation,'" "fixes the obligations of all participating carriers," *Galveston Wharf Co.* v. *Galveston, Harrisburg & San Antonio Ry.*, 285 U.S. 127, 135 (1932) (citation omitted), and "contain[s] the entire contract upon which the responsibilities of the parties rest[]." *Starbird*, 243 U.S. at 597. A "connecting carrier * * * may not vary the terms of the through bill," *Galveston Wharf Co.*, 285 U.S. at 135-136, and will "not become an initial carrier" simply by issuing its own bill "unless the so-called second bill of lading represents the initiation of a new shipment." *Mexican Light & Power Co.* v. *Texas Mexican Ry.*, 331 U.S. 731, 733-734 (1947).

Thus, when an international import shipment is destined for an inland place in the United States, whether Carmack applies on the inland leg of the carriage turns on where the obligation of carriage originated. *Reider*, 339 U.S. at 117. If the international contract of carriage ended at the border such that a new, domestic bill is required for interstate inland carriage, then the inland carriage will constitute a new shipment initiated by a domestic receiving carrier and will be subject to Carmack. See *id.* at 117-118. By contrast, if the carrier's undertaking to transport property to the inland point arose under a through bill issued overseas, Carmack does not apply. See pp. 13-26, *supra*.[11] In this

[11] Several courts of appeals have correctly held Carmack inapplicable to the inland leg of international carriage governed by a through bill of lading for delivery to inland United States destinations. See *Alltadis USA, Inc.* v. *Sea Star Line, LLC*, 458 F.3d 1288, 1291-1294 (11th Cir. 2006) (citing Fourth, Sixth, and Seventh Circuit decisions), cert. dismissed, 549 U.S. 1189 (2007). Those courts also suggest that Carmack would apply if a separate, domestic bill governed the inland leg. *Ibid.* But see *Sompo*, 456 F.3d at 61-63. We understand those decisions to indicate correctly that, if transportation under an international bill ends at the border, as in *Reider*, Carmack requires a new bill of lading for

case, K-Line's international through bills of lading were for transportation to inland destinations. Pet. App. 2a, 4a-5a. Carmack therefore has no application to the inland portion of the carriage or to Union Pacific's role as a connecting carrier for that carriage.

Because Carmack does not govern the through transportation in this case, Carmack does not invalidate the parties' forum-selection agreement embodied in K-Line's bills of lading for respondents' shipments. Those bills permissibly adopted COGSA as the law governing liability for the entire carriage, included a Himalaya Clause permitting Union Pacific to benefit from the contract, see *Norfolk S. Ry.* v. *James N. Kirby, Pty Ltd.*, 543 U.S. 14, 29-32 (2004), and included a forum-selection clause of the type valid under COGSA. See *Vimar Seguros y Reaseguros, S.A.* v. *M/V Sky Reefer*, 515 U.S. 528, 534, 541 (1995). Both K-Line and Union Pacific therefore are contractually entitled to enforce the terms to which respondents agreed in the through bills, including the Tokyo forum-selection clause. That result reflects the nature of the parties' contract and commerce in this case as "essentially maritime." *Kirby*, 543 U.S. at 24.

II. RESPONDENTS COULD NOT CONTRACT OUT OF CARMACK'S LIABILITY PROVISIONS UNDER 49 U.S.C. 10709

A. If the Court agrees that Carmack does not apply to, and thus could not invalidate the forum-selection clause in, K-Line's bills of lading, the judgment of the court of appeals should be reversed. However, if the Court concludes that Carmack applies to the inland portion of the international through transportation here,

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the subsequent interstate carriage and governs that separate, domestic shipment.

the Ninth Circuit was correct in holding that respondents could not avoid Carmack by executing contracts for railroad services under 49 U.S.C. 10709. Consistent with 49 U.S.C. 10502(e), respondents were required to make Carmack-compliant terms available to the party seeking rail services.

Pursuant to 49 U.S.C. 10502(a) and (f), the STB has "exempt[ed] from the requirements of [Subtitle IV of Title 49]" any trailer-on-flatcar and container-on-flatcar service provided by a rail carrier "as part of a continuous intermodal freight movement." 49 C.F.R. 1090.2. That exemption, however, does not "relieve any rail carrier from an obligation to provide contractual terms for liability and claims which are consistent with the provisions of [Carmack]." 49 U.S.C. 10502(e). Under Section 10502(e), a rail carrier providing exempt transportation must offer the shipper the option of contractual terms for liability and claims consistent with Carmack, presumably at a higher rate, and may enter into a contract with different terms only if the shipper does not select that option. Pet. App. 28a-29a; see *Sompo*, 456 F.3d at 60; cf. *New York, New Haven & Hartford R.R.* v. *Nothnagle*, 346 U.S. 128, 135 (1953).

That requirement to offer Carmack-compliant terms is unaffected by Section 10709 for at least two reasons. First, Section 10502(e) specifies contractual terms that the carrier must offer before a contract for carriage is made, whereas Section 10709 specifies the effect of such a contract after it has been executed. See, *e.g.*, 49 U.S.C. 10709(b) and (c)(1). Nothing in Section 10709 relieves a rail carrier providing exempted transportation of whatever obligation it has to make Carmack-compliant terms available to a shipper.

Second, the STB exemption at issue here, 49 C.F.R. 1090.2, broadly exempts the intermodal rail transportation presently at issue from the application of Part-A requirements (which include Section 10709). When the STB exempts a particular type of traffic under Section 10502, the traffic is, absent an express limitation set forth in the exemption itself, no longer subject to any part of the ICA except as provided in Section 10502(e) (Carmack) and 10502(g) (employee protection). The exemption applicable here for intermodal rail transportation includes no such express limitation with respect to Section 10709. Therefore, Union Pacific could not properly enter into a contract under Section 10709 to relieve it of its obligations under Section 10502(e).[12]

The STB's interpretation of its exemption advances important policy considerations. When a rail carrier offers to provide non-exempt transportation under a Section 10709 contract, the entity seeking to obtain such transportation may choose between a contract that places the transportation outside Part-A regulation and the common-carrier rate and terms set by the carrier in

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[12] Because the STB's exemption renders Section 10709 inapplicable, this case presents no opportunity to consider whether a carrier furnishing exempt transportation is statutorily ineligible to invoke Section 10709, as the Ninth Circuit held, see Pet. App. 29a, 31a-33a, or whether, instead, the STB could modify the scope of its exemption to enable rail carriers to enter into Section 10709 contracts for the transportation of otherwise exempt traffic, so long as they also provide terms for liability consistent with Carmack.

Although the government's petition-stage amicus brief in *Kirby* indicated that Section 10709 contracts could apply to exempted traffic and thereby displace Carmack's "liability rules," U.S. Br. at 11 n.4, 12, *Kirby*, *supra* (No. 02-1028), that portion of the brief involved an ancillary point and did not reflect full consideration of the legal issue now squarely presented in this case.

accordance with Part-A regulation (including Carmack). That option to obtain regulated rates and terms is a significant protection for shippers that would lack sufficient bargaining power in negotiations. Cf. H.R. Conf. Rep. No. 1430, 96th Cong., 2d Sess. 100 (1980).

Section 10502(e), by contrast, applies to transportation that has been exempted from regulation, and the carrier therefore has no obligation to make common-carrier rates and terms available to shippers. But Congress wanted shippers to be able to retain Carmack protections, and therefore imposed on the carrier an obligation to "provide"—to offer—contractual terms for liability and claims that are consistent with Carmack. The STB's exemption ensures that such carriers cannot avoid that obligation under Section 10709. It would, at least, be anomalous "for [Section] 10502 to permit a certain category of rail contracts to offer specific rates and terms but require an initial offer of full Carmack liability" and yet for "[Section] 10709 to permit the *same category of rail contracts* to offer specific rates and terms with no such requirement." Pet. App. 31a-32a (internal quotation marks, ellipses and citation omitted).

B. Union Pacific correctly contends (Br. 44-50) that, if Carmack applies in this context, Union Pacific complied with it by offering Carmack-compliant terms to K-Line. Requiring rail carriers that subcontract to perform the inland leg of international through transportation to locate and offer Carmack terms directly to the shipper would impose an unworkable regime and undermine a significant benefit of through transportation by requiring negotiations between shippers and connecting carriers (like Union Pacific) that function as agents of the initial carrier (K-Line) in performing the carriage. That burdensome consequence of the Ninth Circuit's

ruling simply underscores the conclusion that Carmack has no application to international through carriage like that at issue in this case.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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DECEMBER 2009

AMICUS CURIAE BRIEF

Nos. 08-1553 & 08-1554 (Consolidated)

IN THE

Supreme Court of the United States

KAWASAKI KISEN KAISHA LTD., *et al.*,
Petitioners,

v.

REGAL-BELOIT CORPORATION, *et al.*,
Respondents.

UNION PACIFIC RAILROAD COMPANY,
Petitioner,

v.

REGAL-BELOIT CORPORATION, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST OF *AMICUS CURIAE* [1]

Amicus curiae Association of American Railroads (AAR) is an incorporated, nonprofit trade association

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[1] In accordance with Rule 37.2(a), AAR has provided notice of its intent to file this brief to counsel for petitioners and respondents. The parties consented to AAR's filing of an *amicus* brief. Letters expressing consent have been filed with the Clerk of the Court. No person or entity other than AAR has made monetary contributions toward this brief, and no counsel for any party authored this brief in whole or in part.

representing the nation's major freight railroads and Amtrak. AAR's members operate approximately 78 percent of the rail industry's line haul mileage, produce 94 percent of its freight revenues, and employ 92 percent of rail employees. In matters of significant interest to its members, AAR frequently appears before Congress, administrative agencies and the courts on behalf of the railroad industry. This case, which raises the question of whether the Carmack Amendment applies to international shipments moving under a through bill of lading, presents such a matter.

AAR's member railroads handle large volumes of freight arriving from overseas, accounting for a significant share of their business. This business is conducted in accordance with established commercial practices designed to assure that goods move reliably, services are paid for, and the terms of the carriage are well understood. The arrangements railroads enter into, and the manner in which their services are offered and priced, are based to a large extent on the settled understandings of the legal regime that applies to international multimodal shipments. Under the Ninth Circuit's decision, these settled practices can no longer be relied upon by railroads participating in international commerce.

The decision below strikes a blow against uniformity and certainty in an area where predictability is critical. As a result, it will lead to inefficiencies as railroads and other participants in intermodal international transportation are forced to accommodate an unworkable legal rule. AAR filed two amicus briefs in *Norfolk Southern Ry. Co. v. Kirby, Pty Ltd.*, 543 U.S. 14 (2004), another case in which this Court addressed important issues arising in the context of

international commerce. Because resolution of the issues raised by this case are at least as critical, AAR is filing this brief on behalf of its member railroads to emphasize to this Court the significance of the impact of this case on the railroad industry.

STATEMENT OF THE CASE

Amicus adopts the Statement of the Case of Petitioner.

SUMMARY OF THE ARGUMENT

As Petitioner, Union Pacific, correctly argues, the Carmack Amendment does not apply to the inland leg of an international shipment moving under a through bill of lading. Carmack's prescriptions were never intended to apply to overseas shippers who import goods to the United States. The decision of the Ninth Circuit, which holds that Carmack does apply in such circumstances, will have a significant adverse impact on how railroads that participate in foreign trade conduct their business.

Most import shipments are moved from origin to destination in containers—which, because they are easily carried on, loaded onto, unloaded off, and interchanged between, ships and trains—have made the transportation phase of foreign trade remarkably efficient. Import shipments typically move under a through bill of lading, a shipping contract that is intended to cover the entire move and extend its terms to all parties participating in the move. Generally, through bills of lading will extend the terms of the Carriage of Goods By Sea Act (COGSA)—which by statute covers ocean transport to and from U.S. ports—to the inland leg of the transportation. COGSA limits carrier liability for damage to the cargo

unless the shipper declare a value of the goods (something rarely done), and grants the parties flexibility to agree to other contract terms, such a forum selection clause. On the other hand, Carmack prescribes a number of requirements on parties to a bill of lading.

The practice of covering an entire international shipment with the same legal regime under a through bill of lading has enabled railroads to offer transportation services in an efficient manner. As a practical matter, railroads rarely do business directly with the overseas shippers of the cargo. Rather, they enter into arrangements at the point a shipment hits the U.S. port with an ocean carrier (or its agent) or an intermediary, such as a freight forwarder, often agreeing to ship large volumes of freight delivered by these parties. As beneficiaries of the terms negotiated by the ocean carrier with respect to all of the containerized traffic coming off a ship, including liability limitations, railroads need not be concerned with the nature of the goods in each container, or its value to the shipper. Instead, they rely on the common practice under which the originating shipper, who, unlike the railroad is fully aware of the goods' nature and value, elects to insure its cargo. Typically, this permits the shipper to opt for the lower freight rates that are available when the carriers are not faced with the potential of unpredictable liability.

Application of Carmack, which would override the contractual terms to which the parties agreed, and on which railroads rely, will undermine the ability to continue the efficient business practices which have developed in confluence with containerization. Applying different legal regimes to different legs of an international move will create uncertainty for all involved parties. It certainly will pose difficulties

when it is unclear where damage to cargo occurred. The Ninth Circuit's decision, which ignores these practical concerns, not only is contrary to the long-standing rule followed by the majority of the courts, it is inconsistent with this Court's decision in *Kirby*, which is premised on the need for certainty and predictability of contracting in foreign trade.

The Ninth Circuit also held that carriers may opt out of Carmack only pursuant to 49 U.S.C. §10502(e), which it further held required the ocean carrier to offer Carmack terms to the overseas shipper. Union Pacific offered Carmack terms to the ocean carrier with whom Union Pacific did direct business, which, from the standpoint of the railroad, is the shipper of the goods. To the extent offering Carmack terms is necessary, offering such terms to the railroads' direct shipper constitutes compliance with that obligation. Any rule that would require a U.S. railroad to offer Carmack terms to an overseas shipper, with whom they do not deal and whose identity often is unknown, would impose a near impossible burden on railroads.

ARGUMENT

I. APPLYING THE CARMACK AMENDMENT TO MULTIMODAL IMPORT SHIPMENTS MOVING ON A THROUGH BILL OF LADING IS INCONSISTENT WITH THE COMMERCIAL PRACTICES AND SETTLED EXPECTATIONS OF RAILROADS PARTICIPATING IN FOREIGN TRADE

The outcome of this case will have a profound impact on foreign trade and the expectations of the parties that regularly participate in this multi-billion dollar form of commerce. Invoking the Carmack Amendment, 49 U.S.C. §11706, Respondents, who contracted

to ship goods from China to inland destinations in the United States, seek to avoid the contractual obligations to which they agreed. The Ninth Circuit erroneously accepted their position, issuing an opinion that leaves a landscape in which conflicting legal regimes can apply to a single commercial transaction involving the shipment of goods from a foreign country to the United States over both sea and land. Given the significant role of the United States in global trade, the decision below will inject substantial uncertainty into the commercial transactions that underlie international commerce, particularly for U.S. railroads. This result might be acceptable (though hardly desirable) if it reflected what Congress intended; but it does not.

Petitioner, Union Pacific, correctly argues that the Carmack Amendment does not apply under the circumstances of this case. See Pet. Br. at Part I. The Carmack Amendment, which dates to 1906,[2] was enacted to provide certain protections to domestic shippers who were thought to be disadvantaged in their dealings with railroads, at the time the dominant means of transporting freight over land. See *Royal & Sun Alliance Ins. Co. v. Ocean World Lines, Inc.*, 572 F.Supp.2d 379, 389 (S.D.N.Y. 2008). Among other things, Carmack (1) imposes liability on rail carriers receiving or delivering property for the actual loss to the property caused by any transporting rail carrier; (2) prescribes the venue where Carmack claims may be brought; and (3) establishes a minimum statute of limitations for such claims. 49 U.S.C. §11706(a), (d) & (e). To construe Carmack as conferring rights on foreign shippers (or their insurers), who contract with

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[2] Act of June 29, 1906, ch.3591, §7, 34 Stat. 584, 595.

ocean carriers or non-carrier intermediaries, who in turn arrange for a variety of downstream transportation and transportation-related services, goes well beyond the intent of the statute. Certainly, such parties would not have a "reasonable expectation" of being the beneficiaries of Carmack's protection. As the court in *Royal & Sun Alliance Ins.* puzzled, given the purpose of Carmack, "[h]ow can it be said that the foreign shipper—indeed, the foreign insurer of the foreign shipper—is in need of the . . . protection" of that statute? *Id.* at 398.

Not only is Petitioner's position a proper reading of the law,[3] it serves as the basis of the commercial practices, and buttresses the settled expectations, of railroads, and other parties, involved in international trade. These expectations were evidenced by the very arrangements made by the parties to the transaction underlying this case. Indeed, like the parties in this case, when parties to the myriad transactions involving imports to the United States transact business they typically rely on a regime that does not contemplate the application of Carmack: rather, they have come to do business in a way that more closely reflects the realities of international trade.

A. Containerization Has Produced Great Efficiencies in International Transportation in Which Railroads Play a Key Role

The prevailing view among participants in foreign trade today is that shipping cargo from origin to destination involves a unitary transportation service,

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[3] AAR concurs with the position of Union Pacific that the pre-1978 recodification precedent controls with regard to Carmack's application, but will not repeat those arguments in this brief.

notwithstanding the participation of multiple parties and transportation modes. This has come about in response to the technology that has transformed the business: containerization. Noting the evolution of international transportation, this Court explained that "[t]he cause is technological change: Because goods can now be packaged in standardized containers, cargo can move easily from one mode of transport to another. [citation omitted] 'Containerization may be said to constitute the single most important innovation in ocean transport since the steamship displaced the schooner.' [citation omitted]" *Kirby*, 543 U.S. at 25.

Over the past half century, this technological revolution led to the development and growth of multimodal international transportation—the shipment of freight between continents by means of more than one mode of transportation—that today plays a vital role in the global economy. *See generally*, GERHARDT MULLER, *Intermodal Freight Transportation* (3d ed. 1995); DAVID J. DEBOER, *Piggyback and Containers* 159 (1992); DAVID R. MCKENZIE ET AL., *Intermodal Transportation—The Whole Story* 55-57 (1989). Containers are conducive to intermodal transport. They can be stacked on the decks or in the holds of massive ships. They also can be mounted on chassis to be hauled by truck or loaded onto flat cars coupled together to make up long, fast, dedicated intermodal trains. Shipping goods in standard sized containers speeds the loading and unloading process and facilitates interchange between modes, with containers often unloaded off of ships at port directly onto flatcars designed for container transport. Import shipments, which typically consist of high value items such as consumer goods, electronics, household products and clothes, are particularly suited for

transportation in containers. Today, containers predominate in international moves, and millions of containers, accounting for billions of dollars in transportation revenue, are transported from overseas to points in the United States each year.

In short, the advent of containers has transformed international transportation into an integrated service. MULLER at 17. "The international transportation industry 'clearly has moved into a new era—the age of multimodalism, door-to-door transport based on efficient use of all available modes of transportation by air, water and land.'" *Kirby*, 543 U.S. at 25 (quoting 1 T. Schoenbaum, Admiralty and Maritime Law 589 (4th ed. 2004). "Container technology has transformed the transportation process, converting what was once segmented transportation into through transportation and making mulimodal transportation possible." Stephen G. Wood, *Multimodal Transportation: An American Perspective on Carrier Liability and Bill of Lading Issues*, 46 Am. J. Comp. L. 403, 403-04 (1998).

That a railroad, like Petitioner, played an important role in this case is hardly unusual.[4] Railroads are active participants in international trade and a vital link in the global economy. They serve all the major ports ringing the U.S. coast line from Boston to Seattle-Tacoma. Connecting these ports to numerous inland locations, railroads play a key role in the movement of international freight, originating much export traffic, and serving as intermediate or destina-

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[4] Railroads were in the forefront of containerization and continue to use containers in a significant portion of their business, hauling over 9 million last year. Association of American Railroads, *Railroad Facts* 26 (2009 ed.). Significant use of containers by railroads began in the 1920s, while containerization of ocean cargo became widespread in the late 1950s. MULLER at 12-13.

tion carriers for large volumes of import traffic. Railroads derive approximately $3 billion in annual revenue moving import traffic in several million containers.

B. Parties to Foreign Trade Have Adopted Efficient Business Practices Utilizing Through Bills of Lading Which Typically Apply the Same Legal Regime to an Entire Shipment

The technological efficiencies generated by containerization have given rise to commercial efficiencies: multimodal international shipments typically move under a "through" bill of lading.[5] "Today, increasing volumes of cargo are moving under multimodal 'through' bills of lading issued by ocean carriers and intermediaries, such as freight forwarders and non-vessel owner common carriers (NVOCCs), providing the shipper an efficient, stream-lined method of moving goods from 'door-to-door.'" Michael E. Crowley, *The Limited Scope of the Cargo Liability Regime Covering Carriage of Goods By Sea: The Multimodal Problem*, 79 TUL. L. REV., 1461, 1462 (2005). "Contracts for carriage of goods now frequently involve a through bill of lading, whereby the same contract governs the entire shipment, even though multiple carriers and multiple modes of transportation are

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[5] A bill of lading is a document evidencing receipt of goods for shipment issued by persons engaged in the business of transporting or forwarding goods, which contains, among other things, the contract for carriage of the goods. BLACK'S LAW DICTIONARY 168 (6th ed. 1990). A bill of lading issued in a foreign country to govern a shipment throughout its transportation from abroad to its final destination in the United States is termed a "through bill of lading." *Capitol Converting Equipment, Inc. v. LEP Transport Inc.*, 965 F.2d 391, 394 (7th Cir. 1992).

used." Raymond T. Waid, Comment, *Piloting in Post-Kirby Waters: Navigating the Circuit Split Over Whether the Carmack Amendment Applies to the Land Leg of an Intermodal Carriage of Goods on a Through Bill of Lading*, 34 TRANSP. L. J. 113, 114 (Summer 2007). Indeed, the through bill of lading is the commercial manifestation of the potential efficiencies brought about by containerization and is essential to achieving those efficiencies.

International cargo shipments usually involve complex transactions, involving multiple modes of transportation, as well as providers of associated services, who perform different roles, over distances often spanning thousands of miles. It goes without saying that a single entity does not (and cannot) transport goods both by sea and land, and also provide all the loading and unloading services as needed. *See Carman Tool & Abrasives, Inc. v. Evergreen Lines*, 871 F.2d 897, 900 (9th Cir. 1989)("International shipping transactions are relatively complex. The parties usually include the seller, one or more freight forwarders, a carrier, a consignee, as well as several banks and insurers."); *See also* Wood at 404. ("The transportation process creates 'a series of interconnected commercial arrangements' that bring together some or all of the following parties: shipper; banker; insurer; freight forwarder; terminal operator; carrier; and consignee.") Despite their inherent complexities, these transactions all have the straightforward goal of moving freight between two points, quickly, economically and efficiently. Shippers of cargo have an interest in making arrangements for a complete transaction, *i.e.*, shipment from origin to final destination, with all necessary transportation and associated services provided. "[S]hippers and carriers rely on their contractual arrangements, made directly and

through intermediaries, to provide for safe transportation of goods, moving from one carrier to another at low, competitive prices." *Royal & Sun Alliance Ins.*, 572 F.Supp.2d at 387. With this aim in mind, the details of who is performing each aspect of the service is of lesser importance.

Given the various components that make up a "through" international move, arranging for the transportation typically involves a series of commercial transactions in which no single party is directly involved in every transaction. Cargo owners do not enter into individual business relationships with numerous parties providing various aspects of the service, some of whom may be located on different continents. Instead, they usually entrust their goods to a vessel carrier who provides or arranges for the transportation and other services needed to move the goods to their final destination, or to a freight forwarder that will contract in its own name with a vessel carrier to provide those services.[6] Further down the transportation chain, railroads enter into arrangements with ocean carriers (or their agents) calling on U.S. ports, and agree to transport cargo that is off-loaded from the carriers' ships, without regard to the identity of the individual shipper or the content of individual containers. Thus, the series of transactions entered into in this case were unre-

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[6] Intermodal transportation has given rise to numerous service providers devoted not actually to moving cargo, but to the support and facilitation of transportation in a variety of ways. Among other services these companies provide is the consolidation of many small shipments into large consignments for more economical shipping. MULLER at 129. In addition, loading, unloading and storage services typically are components of intermodal moves.

markable, indeed, were typical, of international commerce.

The arrangements contemplated by the through bill of lading allow business to be conducted efficiently, obviating the need for foreign shippers to locate and contract with a land-based U.S. carrier for each shipment it wishes to move. Regardless of the details of a particular transaction, it is the general practice that a party other than the foreign shipper will make the arrangements that will result in the shipper-s goods being placed on a train for inland transport in the United States. Originating international shippers understand this process must occur when they enter into a contract to move their goods, since they are contracting for services which inevitably will be performed by several parties—including inland carriers—some located in different countries and continents. But the fact remains that these are all pieces of the unitary service contracted for by the shippers wishing to move cargo from a specific origin point to a specific destination point.

The through bill of lading typically will establish the rights and obligations of the originating shipper for the entire move. The common practice where import traffic is destined for the United States is for the parties to incorporate the regime set forth in the Carriage of Goods by Sea Act (COGSA), ch. 229, 49 Stat. 1207 (1936), 46 U.S.C. § 30701 (Notes). By its terms, COGSA governs bills of lading covering transportation by ship to or from U.S. ports, but COGSA's reach may be extended contractually to parties participating in a shipment both before loading and after unloading of the ship, 46 U.S.C. § 30701 (Notes Sec.

7).[7] "As a practical matter, contractual extension of the COGSA is now routine in the shipping industry," *Starrag v. Maersk, Inc.*, 486 F.3d 607, 614 (9th Cir. 2007), and is what the parties did in this case.[8]

COGSA and Carmack differ in key respects. In contrast to Carmack's imposition of liability on carriers for the "actual loss" of property transported, COGSA establishes a default liability limitation of $500 per package, unless the nature and value of the cargo is declared by the shipper and inserted into the bill of lading. 46 U.S.C. 30701 (Notes Sec. 4(5)). And, unlike the Carmack Amendment, COGSA does not limit venue; it also has a shorter statute of limitations. Contractual extension of COGSA has become the solution of choice for addressing the problem of conflicting legal regimes that may govern a single shipment. See Marva Jo Wyatt, *Contract Terms in Intermodal Transport: COGSA Comes Ashore*, 16 TUL. MAR. L.J. 177, 178-79 (1991).

The ability to utilize a through bill of lading that effectively establishes uniform terms that apply to the entire shipment—from the overseas origin to the inland U.S. destination—greatly simplifies downstream negotiations, and is key to efficient transpor-

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[7] Contractual extensions of COGSA to cover parties participating in the shipment prior or subsequent to the ocean carriage are known as Himalaya clauses. *Generali v. D'amico*, 766 F.2d 685, 687-88 (1st Cir. 1985).

[8] *Regal Beloit Corp. v. Kawasaki Kisen Kaisha Ltd.*, 557 F.3d 985, 991 (9th Cir. 2009) ("It is undisputed that the responsibility clauses in the bills of lading purport to extend the application of COGSA to the entire period of transport, and that the Himalaya Clause extends the full benefits of the bills of lading to all of the carrier's subcontractors 'as if such provisions were expressly for their benefit.'")

tation practices. A common element in through bills of lading is a provision limiting the liability of the carrier issuing the bill and all downstream parties providing the through transportation in accordance with the COGSA default limits. This enables railroads contracting with ocean carriers for the transportation of containers that arrive at a port to do so on a "bulk" basis. Rather than individually contracting to transport each discrete shipment belonging to a particular originating shipper, railroads contract with ocean carriers to ship large volumes of containers during the term of the contract at agreed to rates. Under this type of arrangement there is no need to be concerned about the specific contents of each container or the value of those contents, obviating the need to take the time and expense to negotiate over each shipment based on the level of risk that the carrier might be exposed to should a loss occur. As a result, railroads can load a large volume of containers onto a single train, without the need to differentiate among them based on which of the vast array of goods that are imported to the United States is in each container or goods' value.

This manner of doing business can be effective only if the parties can be confident that a single liability regime, as set forth in the through bill of lading, will apply. However, if Carmack applies to the inland move, and, consequently, a railroad can potentially be liable for the "actual loss" should some mishap occur, prudent business practices will require railroads to determine the level at which to insure and/or price this transportation on an individual basis, and contract accordingly. If railroads lose the ability to view each container they transport as essentially the same commodity, governed by the same legal regime, it will in turn complicate the contracting by origina-

ing shippers, who generally choose to enter into through bills of lading intended to extend their terms to an entire shipment.

When arranging to import goods into the United States, shippers typically do not declare a value of their goods as COGSA permits, as that likely would result in a higher freight rate to account for the increased risk taken on by the carriers. *See Carman Tool*, 871 F.2d at 899 ("The shipper may, however, increase the carrier's liability by declaring on the bill of lading the nature and value of the goods shipped, and paying an ad valorem freight rate."); *Wemhoener Pressen v. Ceres Marine Term., Inc.* , 5 F.3d 734, 735 (4th Cir. 1993)("Shippers are entitled to avoid liability limitations if they so choose by entering the value of the goods in the space provided on the Express Bill and by paying a higher price to ship the goods . . .") Rather, shippers generally leave the $500 per package limit in place, choosing the certainty of purchasing insurance for the full value of the goods over the inherent risks involved in relying on enforcement of the putative right to collect damages from liable parties.

This choice to insure makes commercial sense, and generally constitutes the most rational and efficient means of doing business. *See Traveler Indemnity Co. v. Vessel Sam Houston*, 26 F.3d 895, 899-900 (9th Cir. 1994)(sophisticated shipper made a considered choice to insure its cargo rather than opt for higher liability limits). This is so because the originating shipper knows exactly what is being shipped and the shipment's value. On the other hand, carriers, particularly a railroad situated a continent away that has arranged to accept numerous containers—which remain unopened until final destination is reached—

without extensive and costly individualized inquiry as to the identity of the originating shipper and the specific nature of the goods contained therein, generally are not in a position to even approximate the goods' value. Thus, the originating shipper is in the best position to determine whether to declare a high value or to insure, and at what level. Similarly, insurers who underwrite this insurance know they are insuring a risk for which other parties' liability is limited. As one court explained, "shippers and intermediaries balance costs of insurance and freight, and enter into package limitation clauses according to their evaluations of the relative economies and efficiencies between higher freight rates and lower insurance rates, or lower freight rates and higher insurance rates, in determining the relative responsibilities, between carriers and insurers, should their goods be damaged in transit." *Royal & Sun Alliance Ins.*, 572 F.Supp. at 388. Insurers understand that they may have to pay their insured for the full value of any damaged cargo yet be limited by the liability limitations agreed to by their insured. *Id.* at 392. Presumably, the premium charged will reflect that risk. *Id.*

Application of Carmack to the land-based segment of import shipments to the United States surely will introduce a significant element of uncertainty to the routine assessments made by shippers, carriers and insurers when they arrange for multimodal transportation, to the ultimate detriment of international trade. The potential to be governed by Carmack's prescriptions introduces a new factor for downstream carriers, like railroads, to consider, which inevitable will affect the terms that can be offered to the originating shipper. Thus, if downstream, land-based carriers face Carmack's prescriptions, which are

likely to differ from the agreement embodied in the through bill of lading, originating shippers also stand to lose the certainty and predictability that characterizes through shipping today.

Certainly, the liability regime that applies to a shipment is important, but so too are other contract terms, like provisions setting forth where the parties will litigate any dispute that arise. This case involves the validity of the venue provision in the through bill of lading, and turns on whether Carmack, which restricts venue, applies to the inland move during which the cargo was allegedly damaged.[9] Like liability allocations, venue provisions reflect efficient choices that are freely entered into by the parties for any number of reasons. Courts should respect those contractual arrangements which, just as allocation of liability, constitute part of the bargain entered into by the parties.

C. The Ninth Circuit's Decision Undermines the Efficient Practices Which Benefit All Parties in International Trade and on Which Railroads Have Come to Rely

The majority of the courts of appeals have properly limited Carmack's application, holding that Carmack does not apply to shipments that originate overseas under a through bill of lading unless a separate domestic bill of lading is issued by the inland carrier. These decisions are based on the long accepted con-

[9] "A reasonable forum selection clause typically is enforceable under COGSA, but such a clause is valid under Carmack *only* if the parties fulfill one of Carmack's two statutory methods for contracting out of the statute's venue restrictions." *Regal-Beloit*, 557 F.3d at 988.

struction of Carmack, which was never meant to reach shipments that originate in foreign countries in the absence of a separate domestic bill of lading. *E.g.*, *Sklaroff v. Penn. R.R.*, 90 F. Supp. 961, 962 (E.D. Pa.), *aff'd*, 184 F.2d 575 (3rd Cir. 1950)(adopting the reasoning of *Alwine v. Penn. R.R.*, 15 A.2d 507 (Pa. Super. Ct. 1940); *Strachman v. Palmer*, 82 F.Supp. 161 (D. Mass), *aff'd*, 177 F.2d 427, 429 (1st Cir. 1949)(same); See Pet. Br. at 29-30.[10] The upshot of this rule is that parties engaged in international trade can rely on the terms of the through bill of lading that typically is intended to cover the transportation from origin to destination. On the other hand, where a separate domestic bill of lading is issued by the inland carrier it reflects the parties' intent to treat the inland move as distinct from the ocean move, potentially subject to different terms. *Reider v. Thompson*, 339 U.S. 113, 117 (1950).

The long-standing majority rule on Carmack's application is consistent with this Court's decision in *Kirby* which "affirmed the broad principle that courts should evaluate multimodal contracts in their entirety rather than treat each of the multiple stages in multimodal transportation as subject to separate legal regimes, which would present an obstacle to efficient

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[10] More recent decisions have been in accord. *Altadis USA, Inc. v. Sea Star Line, LLC*, 458 F.3d 1288 (11th Cir. 2006); *American Road Service Co. v. Consolidated Rail Corp.*, 348 F.3d 565 (6th Cir. 2003); *Shao v. Link Cargo (Taiwan) Ltd.*, 986 F.2d 700 (4th Cir. 1993); *Capital Converting Equipment, Inc. v. LEP Transport, Inc.*, 965 F.2d 391 (7th Cir. 1992); *Swift Textiles, Inc. v. Watkins Motor Lines, Inc.*, 799 F.2d 697 (11th Cir. 1986), *cert. denied*, 480 U.S. 935 (1987). This construction of Carmack was only called into question three years ago by the Second Circuit in *Sompo Japan Ins. Co. of America v. Union Pac. R.R.*, 456 F.3d 54 (2d Cir. 2006), and more recently, by the court below.

liability rules." *Royal Ins. Co. of Amer. v. Orient Overseas Container Line LTD*, 525 F.3d 409, 414 (6th Cir. 2008). Reliance on this rule has enabled both railroads and import shippers to contract for services in an efficient manner through one party. *See supra* pp. 14-17. In contracting with ocean carriers, railroads rely on the ocean carriers' commitment to pass on limited liability under COGSA when they establish the rates under which they will transport the imported goods. Thus, railroads can transact business with their immediate customer, the ocean carrier, without the need to identify cargo owners residing across oceans. The efficacy of these business practices will be greatly diminished if the Ninth Circuit's decision is upheld.

In contrast to the majority rule, and notwithstanding the clear contractual intent of the parties that the entire shipment from the foreign origin point to inland destinations in the United States be governed by the same terms, the Ninth Circuit viewed this case as constituting a series of atomized transactions, with Carmack applying once the cargo was loaded onto a train at the port. If Carmack applies to the inland rail leg of import shipments moving under through bills of lading, as the Ninth Circuit concluded, one set of rules would apply while the cargo is transported by sea, and another set when transported over land. Carmack's prescriptions would be in effect when damage occurs during land-based transport of the goods, but not the sea-based transport. However, as this Court admonished, "the shore is now an artificial place to draw a line." *Kirby*, 543 U.S. at 25.

A distinction between the land and sea-based leg of the same shipment defies logic where, as in this case,

the ocean carrier has contracted to perform the entire move to destination and will subcontract, at its discretion, for the necessary services (like land-based transportation) that it is not in a position to perform. Moreover, in some cases damage to the cargo will be discovered only after the containers are opened at their destination, and it will not be immediately (if ever) clear as to when the damage occurred. *E.g.*, *Kyodo U.S.A. v. Cosco N. America, Inc.*, 2001 WL 1835158 at *3, n.6 (C.D. Cal. 2001)(pointing out that the evidence did not indicate whether the damage to the cargo occurred during the domestic leg or international leg, that the court would assume for the purpose of defendant's motion to dismiss that it occurred on the domestic leg, but that if the evidence eventually showed otherwise, the issue could be revisited). And, even if the point of damage or loss is known, there may be a dispute over which party was responsible for the cargo at that point.

The Ninth Circuit's holding is premised on the fiction that cargo owners intend to contract for one set of terms on one leg of the shipment and another set of terms for the other leg of the shipment. This is belied by the common practice of utilizing a through bill of lading to contract for uniform terms to govern all parties to, and all legs of, a multimodal international shipment. If the arrangements that have served historically to limit railroad liability are overridden by application of Carmack, railroads will no longer be able to enter into international transportation arrangements with assurance that they have foreclosed exposure to unforeseen and unpredictable liability to unknown parties.

II. ANY RAILROAD OBLIGATION TO OFFER CARMACK-COMPLIANT TERMS IS SATISFIED BY MAKING SUCH AN OFFER TO THE PARTY FROM WHOM THE RAILROAD ACCEPTS THE GOODS

The prescriptions of the Carmack Amendment are not unalterable. Under the ICC Termination Act,[11] parties are free to enter into transportation arrangements that limit the application of Carmack by contract: that is not in dispute. Having held that Carmack applies, the Ninth Circuit further held that because the shipment involved "exempt" traffic[12] carriers may opt out of Carmack's requirements only as permitted under 49 U.S.C. §10502(e), which it construed to require the ocean carrier to offer Carmack terms to the overseas shipper. Unsure of whether this had been properly accomplished in a case like this involving multiple parties and multiple contracts, the Court remanded the case to the district court. Should this Court reach this question, it should fashion a rule that accounts for the practicalities of international multimodal transportation.

Petitioner entered into a contract with the ocean carrier, from whom it accepted the cargo, which offered the option of Carmack-compliant terms for inland domestic traffic. Pet. Br. at 44-45. This was a

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[11] Pub. L. No. 104-88, 109 Stat. 803 (1995), *codified at* 49 U.S.C. §§ 10101 *et seq.* ICCTA replaced the Interstate Commerce Act (ICA), eliminated the ICC and assigned its surviving functions to the Surface Transportation Board (STB). See 49 U.S.C. §§ 701-702.

[12] The STB has authority to exempt from the requirements of the ICA "transportation that is provided . . . as part of a continuous intermodal movement." 49 U.S.C. §10502(f), authority which it has exercised. 49 C.F.R. §1090.2.

logical, and the only practical, option for Petitioner, since, from its standpoint (and that of any similarly situated rail carrier), and pursuant to the terms of the applicable contract, the ocean carrier with whom it does business is the shipper of the goods. Moreover, the railroad usually is unaware of where the goods originated, how many other parties might have been involved in the transaction (or their identities) and the nature and value of the goods. Any rule that would hold the railroad responsible for seeking out and offering Carmack-compliant terms to an overseas cargo owner would create a near impossible obligation on railroads participating in international commerce and prevent the efficient allocation of risk currently produced by market transactions.

Under such a rule, railroads might be compelled to require its shipper (typically an ocean carrier or its agent) to certify that Carmack compliant terms are offered to the foreign cargo owner, and to seek a defensive indemnity against liability that might arise if that offer is not made or deemed ineffective. (Of course, the ocean carrier itself may not even be dealing directly with the cargo owner, who may have engaged the services of an intermediary.) In turn, the other parties involved in the shipment of the goods may feel compelled to take similar action. Indeed, given the insurer's effort to cherry-pick its legal regime despite the originating shipper's acceptance of liability limits from the originating carrier, each entity in the transportation chain may feel compelled to seek multiple layers of assurance regarding liability agreements. The creation of these linked indemnities will result in a cascade of parties being drawn into litigation if the shipper/insurer is able to bypass the freight forwarder's/ocean carrier's limitations of liability and proceed against the railroads, or

some other party involved in the transportation, for excess recoveries pursuant to Carmack. Moreover, from the standpoint of the railroads, indemnity rights only provide a meaningful remedy to the extent the indemnifying party is solvent and amenable to suit, a circumstance that is not always assured. This hardly is an effective way to do business. See Pet. Br. at 48-49.

The alternative would be for railroads directly to offer Carmack-compliant terms to foreign shippers. But, given the nature of international shipments, it would be highly impractical to expect railroads to find a way to contract directly with parties with whom they would not ordinarily deal (and whose identity is almost always unknown to them), a proposition of questionable feasibility and likely considerable expense. *See Carman Tool*, 871 F.2d at 901 (declining to impose on carriers a heavy "burden of tracking down remote parties and advising them" of the right to declare a higher value of the good on a bill of lading.) While a railroad can offer Carmack-compliant terms to the party from whom it receives the freight—and indeed, Petitioner did so here—it is not in a position to assure such an offer is made overseas, as part of a contract negotiation that occurs an ocean away. *See Kirby*, 543 U.S. at 35 (acknowledging the impracticality of seeking out information about the terms of upstream contracts). From the standpoint of an inland carrier, any obligation it has with respect to Carmack must be satisfied in its dealing with the party from whom it receives the freight, regardless of whether the traffic is exempt. This is precisely the reason that this Court has recognized that it is counterproductive to adhere to the fiction that the shipper is not bound by the terms of a through bill of lading issued to the freight forwarder that has been

engaged to arrange transportation for that shipper=s goods.

* * *

Five years ago, in *Kirby*, this Court clarified the rules that apply to multimodal international shipments. Importantly, this Court held that a shipper is bound by the liability terms in a contract entered into between its intermediary and a carrier. Rather than apply traditional agency principles, the Court established an "efficient default rule" of maritime law that enables a carrier to assume that an intermediary entrusted with cargo is contracting on behalf of the cargo owner, and to rely on the liability terms agreed to with the intermediary. *Id.* at 33-34. As a result, when such a contract extends its coverage to downsteam carriers, they too may avail themselves of its benefits and enforce it against the cargo owner. This Court explained that this rule "ensure[s] the reliability of downstream contracts for liability limitations" and "tracks industry practices." *Id.* at 34. The Ninth Circuit's decision upends this sensible approach to multimodal international shipments and should be reversed.[13]

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[13] See *Atlantic* where the Court opined that the argument that Carmack applies to the inland leg of a shipment moving under a through bill of lading is "in tension" with *Kirby*. 158 F.3d at 1293.

CONCLUSION

For the foregoing reasons, the decision of the Ninth Circuit should be reversed.

Respectfully submitted

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AMICUS CURIAE BRIEF

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Supreme Court of the United States

KAWASAKI KISEN KAISHA LTD.
AND K-LINE AMERICA, INC.,
Petitioners,

v.

REGAL-BELOIT CORPORATION, et al.,
Respondents.

UNION PACIFIC RAILROAD COMPANY,
Petitioner,

v.

REGAL-BELOIT CORPORATION, et al.,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE INTERNATIONAL GROUP OF PROTECTION AND INDEMNITY (P&I) CLUBS, ET AL., AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Ltd.

The West of England Ship Owners' Mutual Insurance Association (Luxembourg)

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INTEREST OF THE AMICI CURIAE[1]

The decision of the lower court in this case, if allowed to stand, would introduce substantial uncertainty into the law governing loss of or damage to cargo carried within the United States as part of a multimodal carriage between a place in a non-adjacent foreign country and a place in the United States. The uncertainty would adversely affect the cost to shipowner, ship operator, and charterer members of the mutual Protection and Indemnity Associations ("Clubs") comprising the International Group of P&I Clubs ("Group"). The mutual liability insurance provided by the Clubs rests to a great extent on all insured members being exposed to risks common to the use and operation of ships and to liabilities defined and limited by the same or similar laws. It is for this reason that the Clubs strongly support and rely on regulation by way of international rather than regional or domestic legislation. That reliance would be damaged in respect of cargo liabilities by the uncertainty introduced by the possibility that the Carmack Amendment ("Carmack")[2]

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[1] No counsel for any party authored this brief in whole or in part, and no person other than the amici curiae represented in this brief made any monetary contribution to its preparation or submission. Written consents from the parties to the filing of this brief are on file with the Clerk of the Court. The parties were notified ten days prior to the due date of this brief of the intention to file.

[2] In 1906, Congress amended the Interstate Commerce Act by passing the Hepburn Act. The portions of the Hepburn Act

(Continued on following page)

would govern the U.S. inland part of multimodal carriage. Even if we assume *arguendo* that Carmack would apply consistently, Carmack itself is not consistent.

The Group is comprised of thirteen principal Clubs located worldwide including the United States, namely: The American Steamship Owners Mutual Protection and Indemnity Association, Inc.; Assuranceforeningen Gard (Gjensidig); Assurance-foreningen Skuld (Gjensidig); The Britannia Steam Ship Insurance Association Ltd.; The Japan Ship Owners' Mutual Protection & Indemnity Association; The London Steam-Ship Owners' Mutual Insurance Association Ltd.; The North of England Protecting and Indemnity Association Ltd.; The Shipowners' Mutual Protection and Indemnity Association (Luxembourg); The Standard Steamship Owners' Protection and Indemnity Association (Bermuda) Ltd.; The Steamship Mutual Underwriting Association Ltd.; The Steamship Mutual Underwriting

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dealing with interstate carrier liability, commonly known as the Carmack Amendment, were originally codified at 49 U.S.C. § 20(11) (1976). The Carmack Amendment was later extended to motor carriers by the Motor Carrier Act of 1935, ch. 498, 49 Stat. 543 (1935). The Carmack Amendment was recodified in 1978 (1978 Recodification, Pub. L. No. 95-473, 49 U.S.C. § 10501 [Carmack] 92 Stat. 1359 (1978), 49 U.S.C. §§ 10730 and 11707) and again in 1996. The Carmack Amendment is now found at 49 U.S.C. § 11706 (rail carriers) and 49 U.S.C. § 14706 (motor carriers). This brief shall refer to this legislation as the "Carmack Amendment" or as "Carmack." *See* K-Line Pet. App. 62a-91a.

Association (Bermuda) Ltd.; Sveriges Ångfartygs Assurans Förening (Swedish Club); United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Ltd.; and The West of England Ship Owners' Mutual Insurance Association (Luxembourg) respectfully submit this brief as amici curiae in support of Petitioners.

Amici Clubs are thirteen principal mutual marine liability insurance associations. The Clubs are "associations of shipowners banded together to spread and absorb mutual liabilities falling on their members." Grant Gilmore & Charles L. Black, Jr., *The Law of Admiralty* 76 (2d ed. 1975).[3] The members of the Clubs are owners, operators, and charterers of ships of practically all maritime nations. The thirteen Clubs represented here insure approximately ninety-two percent (92%) of the world's ocean-going ship tonnage carrying approximately 90% of world trade.

The individual Clubs as amici curiae here are members of the International Group of P&I Clubs, which, inter alia, places reinsurance for its member Clubs. The Clubs compete with one another. Above each Club's individual retention, currently $7 million each and every occurrence, they do pool, that is share, cargo and other types of claims associated with the

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[3] For a discussion on the history and function of P&I clubs, *see* Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 19-12 (4th ed. 2004), and Mark Tilley, *The Origin and Development of the Mutual Shipowners' Protection & Indemnity Association*, 17 J. Mar. L. & Com. 261 (1986).

use and operation of ships, e.g. pollution claims, wreck removal claims, death and injury to passengers and crew inter alia up to an amount of approximately $6 billion per occurrence. Claims between $50 million and $3.05 billion each and every occurrence are protected by market reinsurance purchased collectively through the International Group. This reinsurance contract is written annually and 18 of the world's "top 20" reinsurers participate in the contract. It is the largest marine contract written each year. The Clubs are able to provide this high cover because the cargo and other risks insured by the Clubs are insured on the same terms and conditions by each Club and are therefore capable of being pooled. Currently Club cover for cargo claims essentially is limited to liabilities imposed under the liability regimes contained in the Hague, the Hague/Visby Rules or other legislation incorporating these regimes, e.g. the U.S. Carriage of Goods by Sea Act ("COGSA").[4] This consistency of cover allows the risks to be

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[4] U.S. Carriage of Goods by Sea Act, ch. 229, 49 Stat. 1207 (1936), Pub. L. No. 109-304, 120 Stat. 1485 (2006), *reprinted in* note following 46 U.S.C. § 30701; International Convention for the Unification of Certain Rules Relating to Bills of Lading, signed at Brussels, Aug. 25, 1924, 51 Stat. 233, 247, 120 L.N.T.S. 155 ("Hague Rules"), *reprinted in* 6 Benedict on Admiralty, Doc. No. 1-1 (7th rev. ed. 2007); Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, signed at Brussels on Aug. 25, 1924, Feb. 23, 1968, 1412 U.N.T.S. 128 ("Hague/Visby Rules"), *reprinted in* 6 Benedict on Admiralty, Doc. No. 1-2 (7th rev. ed. 2007).

underwritten by individual Clubs and in the event the claim exceeds the Club's retention, to be pooled.

Mutuality is based on the sharing of common as opposed to individual risks. The concept relies heavily on the commonality and uniformity of the risks to which those parties mutualizing the risk are exposed. Lack of uniformity as is the case with the Carmack Amendment, because the Carmack Amendment does not itself provide uniform terms, undermines the mutual concept. Carmack permits U.S. inland carriers to agree to varying limitations of liability and other contractual terms if certain conditions are met. Carmack does not provide a consistent liability limit as do the Hague Rules, the Hague/Visby Rules, and COGSA.[5] Where cargo is shipped worldwide from ports and places other than the U.S., it is not possible for carriers to arrange their U.S. inland carriage terms with any certainty or predictability if Carmack

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[5] Compare § 4(5), ch. 229, 49 Stat. 1207 (1936) *reprinted in* note following 46 U.S.C. § 30701 ("Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States . . . unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading.") with 49 U.S.C. § 11706(c)(3)(A) ("A rail carrier providing transportation or service subject to the jurisdiction of the Board under this part may establish rates for transportation of property under which – (A) the liability of the rail carrier for such property is limited to a value established by written declaration of the shipper or by a written agreement between the shipper and the carrier; . . .").

applies to the U.S. inland carriage. The parties to contracts for U.S. inland carriage may and do agree to various differing amounts of liability for different contracts. Carmack's internal inconsistency prevents uniformity of risks, which as is said above is the basis of mutual insurance. Trade amongst nations other than the United States does not present this problem. As a result, the Clubs might impose a surcharge for covering multimodal carriage in the United States. If that were the case, multimodal carriers might obtain separate insurance for the U.S. inland portion of the multimodal carriage or decide to limit the extent of the multimodal service that they currently provide, so as to exclude the inland portion of the carriage. If the carriers adopted this approach, the reliability associated with the cover provided by the Clubs would be lost to the detriment of third-party persons filing claims against carriers. Moreover the cost of trading with the United States would thus likely be higher than the cost of trading with other nations.

INTRODUCTION

This case raises an issue that affects virtually all the multimodal carriage of cargo between non-adjacent foreign countries and the United States. In 2008, U.S. ocean container ports handled 28.2 million

TEUs,[6] nearly all of which were transported throughout the country by either rail or truck carriers. U.S. Dep't of Transp., Bureau of Transp. Statistics, America's Container Ports: Freight Hubs That Connect Our Nation to Global Markets 3, 16 (2009). Uniformity and predictability of maritime law are essential not only to the Amici P&I Clubs, but also to world commerce. Insurance may be arranged for vessel interests more efficiently if the law that governs the carriage of cargo is uniform and predictable. The application of one law, COGSA, throughout the entire door-to-door multimodal carriage of goods is extremely beneficial to all parties involved in multimodal carriage and the efficient operation of multimodal movements. *See* Pet. App. 48a-61a.[7]

If, instead of COGSA, Carmack were to apply to the U.S. inland part of multimodal carriage, the inland carriers or the contracting carriers would, according to the lower court opinion in this case, have to give the shipper a fair opportunity to demand full Carmack coverage, which is quite different than COGSA. Full Carmack rights would have to be offered as the primary regime to govern the inland carriage. Pet. App. 33a-35a.

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[6] Because shipping containers are of various lengths, the TEU (twenty foot equivalent) was developed as the standard measure for counting containers. One 40 foot container equals 2 TEUs.

[7] "Pet. App." refers to the Appendices to the Petition for Writ of Certiorari filed by Petitioners on June 18, 2009.

Offering such a fair opportunity and the notice of the alternative terms required by Carmack to the shipper would be very difficult if not impossible in practice. In multimodal carriage, the inland carrier does not contract directly with the shipper. The shipper contracts with the contracting carrier, which may be a non-vessel operating common carrier ("NVOCC") or a vessel operating common carrier ("VOCC") or some other kind of contracting carrier. The contracting carrier might contract directly or indirectly with the U.S. inland carrier. The contracting carrier probably would not know which inland carrier would perform the U.S. inland carriage or the terms of that unknown inland carrier's contract at the time it contracted with the shipper. Without that knowledge, the contracting carrier could not give the shipper notice of the alternate terms a particular inland carrier wished to use.

Moreover, if more than one law were to govern various parts of each carriage, resolution of claims for loss or damage would be needlessly and wastefully complicated. Before the merits of a claim could be addressed, the applicable law (Carmack or COGSA) would have to be determined. The applicable law could not be ascertained until the location of the loss or damage and the location of its cause was determined.[8]

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[8] Moreover, if COGSA governed the ocean part of the carriage and Carmack governed the land part, the receiver would want to make a claim against both the ocean carrier and a land carrier, whose liability may be higher than the ocean carrier's. Carmack imposes a strict, insurer-type liability scheme

(Continued on following page)

The location of the loss or damage or the location of its cause may be difficult or impossible to prove. Ocean containers used for multimodal transportation are generally not opened during their carriage; as a result, damage or loss is often not discovered until the container reaches its final destination and is opened by its receiver. If different legal regimes required shippers to open and inspect containers as they were transferred from one mode or party to another, the transportation would be slowed and cargo might be damaged or pilfered. The ocean container has greatly reduced damage and loss during transportation.[9] This advantage should not be lost by a need to open containers in transit.

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on the carrier while COGSA employs a fault-based liability scheme. *See Sompo Japan Ins. Co. of America v. Union Pacific R.R. Co.*, 456 F.3d 54, 58 (2d Cir. 2006); *Rankin v. Allstate Ins. Co.*, 336 F.3d 8, 9 (1st Cir. 2003); *see also Missouri P. R. Co. v. Elmore and Stahl*, 377 U.S. 134, 137 (1964). If COGSA governed the entire carriage, the receiver could prove its prima facie case simply by proving delivery of a certain quantity of cargo to the carrier in good order and condition and delivery by the carrier in damaged condition, or that some cargo was missing when it was delivered to its receiver. The claim would be governed only by COGSA. There would be no reason for cargo interests to attempt to improve their chances of recovery by suing the inland carrier in addition to the contracting carrier.

[9] *See generally* Marc Levinson, *The Box* 1-4 (2006) (suggesting that the container shaped the world economy by reducing the time and costs of shipping); Henry A. Tombari,

(Continued on following page)

SUMMARY OF ARGUMENT

As more fully explained below, the concept of mutual insurance underpins the liability cover effected by the owners of the great majority of the world's ocean-going ship tonnage. Mutual insurance depends on known and predictable liability regimes. The Carmack Amendment does not provide a knowable and consistent liability and if applied, as it was by the court below, to multimodal through bills of lading, it will increase the potential liability during the U.S. land-based leg of international carriage. This increase of potential liability will increase the cost of insurance and ultimately the cost of international trade to and from the U.S. It will also increase the likelihood, cost and complexity of litigation of cargo claims.

However, the decision below should not stand because the Carmack Amendment simply does not apply to carriage of goods between a non-adjacent foreign country and a place in the United States. It only applies to carriage from one U.S. state or territory to another or to carriage between an adjacent foreign country and a place in the United States. This limited foreign application makes sense

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Trends in Oceanborne Containerization and its Implications for the U.S. Liner Industry, 10 J. Mar. L. & Com. 311, 311-12 (1979). ("Overall, the advantages of containerization over the breakbulk system are to reduce (i) the time and effort needed to handle cargo; (ii) possible theft and damage; (iii) time required to move from point of origin to final destination and (iv) a ship's turn around time in port.").

and allows one liability regime to govern international multimodal carriage, including the U.S. inland portion of that carriage. It allows the carrier to extend its defenses and limitation via its Himalaya Clause[10] to all parties that it subcontracts to perform a particular part of a carriage.

The scope of Carmack was quite clear before Congress attempted in 1978 to clarify and modernize its language by recodification. The pre-1978 recodification language clearly described Carmack's scope of foreign carriage application to carriage between the United States and adjacent foreign countries. 49 U.S.C. § 20(11) (1976).

Congress clearly stated that the 1978 recodification was not intended to change the substance of the Carmack Amendment. Despite that clear introductory paragraph in the recodification bill,[11] the 1978 language has been interpreted by two circuits, the Second Circuit and the Ninth Circuit, to have made a very important substantive change by extending Carmack's scope from carriage between the United States and adjacent foreign countries to all foreign countries.

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[10] The term "Himalaya Clause" derives its name from the *S/S Himalaya*, which was involved in *Adler v. Dickson*, [1955] 1 Q.B. (C.A. 1954) (*reprinted at* 2009 AMC 2917), and is used to describe provisions that extend maritime liability limitations. *See, e.g., Norfolk Southern Ry. Co. v. James N. Kirby Pty Ltd.*, 543 U.S. 14, 20 n. 2 (2004).

[11] Pub. L. No. 95-473, 49 U.S.C. § 10501 [Carmack], 92 Stat. 1359 (1978), 49 U.S.C. §§ 10730 and 11707.

If allowed to stand, the lower court opinion in this case would also severely harm the uniformity sought by the United States while negotiating the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, the Rotterdam Rules, which were approved by the U.N. General Assembly on December 11, 2008.[12] One of the first issues negotiated by the UNCITRAL[13] Working Group III that drafted the Convention determined whether the new Convention would govern during the entire door-to-door multimodal carriage or only during the ocean port-to-port portion of the carriage.

The Convention provides that its terms will govern contracts between shippers and contracting carriers for the entire door-to-door carriage with the exception that where loss, damage or delay in delivery occurs prior to loading or post-discharge, the provisions of any other compulsorily applicable international instrument that governs liability, limitation of liability, or time for suit will prevail over the provisions of the Convention.[14] That exception does not involve carriage in the United States.

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[12] UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea ("Rotterdam Rules"), Dec. 11, 2008 General Assembly Resolution 63/122, Annex, U.N. Doc. A/RES/63/122.

[13] United Nations Commission on International Trade Law.

[14] Rotterdam Rules, Article 26.

The Convention will govern multimodal contracts of carriage, including the inland U.S. portion. Although the Rotterdam Rules will govern the U.S. inland portion of the contract between cargo interests and the contracting carrier, the Rotterdam Rules will not govern actions between the contracting carrier and inland sub-contracted carriers such as railroads or trucking companies. The Rotterdam Rules would also not govern a tort action by cargo interests against a U.S. inland rail or road carrier.

Complete door-to-door uniformity of laws governing liability in the United States may be extended to the U.S. railroads and trucks through the contracting carrier's Himalaya Clause if the decision of the lower court is reversed. However, if the Carmack Amendment is applied then there cannot be uniformity for the entire carriage.

This Court emphasized in *Kirby*, 543 U.S. 14, the need for uniformity in the law governing contracts for multimodal carriage and demonstrated the use of Himalaya Clauses to achieve uniformity by extending COGSA to the U.S. inland carriage:

> Likewise, a single Himalaya Clause can cover both sea and land carriers downstream. . . . Confusion and inefficiency will inevitably result if more than one body of law governs a given contract's meaning. As we said in *Kossick*,[15] when "a [maritime] contract

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[15] *Kossick v. United Fruit Co.*, 365 U.S. 731 (1960).

> . . . may well have been made anywhere in the world," it "should be judged by one law wherever it was made." Here, that one law is federal.

Id. at 29.

The lower court in this case recognized the policy expressed by this Court in *Kirby*,[16] but claimed that the "plain meaning" of Carmack, a federal statute, took precedence over COGSA.[17]

The lower court opinion would prevent the uniformity of law sought by the United States while negotiating the Rotterdam Rules and by this Court in deciding *Kirby*. *Id.*

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[16] "Defendants fairly argue that policies recently endorsed by the Supreme Court-such as uniformity in the law of maritime contracts and contractual autonomy for sophisticated shippers and carriers-recommend applying COGSA here. *See Kirby*, 543 U.S. at 29, 125 S.Ct. 385." *Regal-Beloit Corp. v. Kawasaki Kisen Kaisha Ltd.*, 557 F.3d 985, 992 (9th Cir. 2009); Pet. App. 12a.

[17] "The policy of uniformity in maritime shipping law, however compelling, must give way to controlling statutes and precedent. Given *Neptune's* [*Neptune Orient Lines, Ltd. v. Burlington N. & Santa Fe Ry. Co.*, 213 F.3d 1118 (9th Cir. 2000)] holding that Carmack applies and the conspicuous absence in COGSA of language allowing parties to give superseding statutory force to their contractual extensions of COGSA inland under Section 7, we hold that a mere contractual extension of COGSA is not sufficient by itself to overcome Carmack." *Id.* at 998; Pet. App. 26a.

ARGUMENT

I. MUTUAL INSURANCE BRINGS SECURITY AND STABILITY TO INTERNATIONAL TRADE. IT DEPENDS ON PREDICTABLE LIABILITY REGIMES GOVERNING MULTI-MODAL TRANSPORTATION.

The great majority of the world's ocean-going shipping tonnage is insured by the Clubs. Clubs are "associations of shipowners banded together to spread and absorb the liabilities falling on their members."[18] Mutual protection and indemnity insurance emerged in the mid-nineteenth century when shipowners sought ways to protect themselves for liability for newly recognized third-party risks that other types of underwriters were not interested in covering.[19] The Group is a non-profit organization comprised of thirteen principal individual non-profit making Clubs, which provide liability cover to approximately 92% of the world's ocean-going ship tonnage and which share or pool their larger claims. Mutual insurance provides security and stability to international maritime trade because the claims of individual shipowners are secured not by a single insurer, but rather by the owners of 92% of the

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[18] Grant Gilmore & Charles L. Black, Jr., *The Law of Admiralty* 76 (2d ed. 1975).

[19] Mark Tilley, *The Origin and Development of the Mutual Shipowners' Protection & Indemnity Associations*, 17 J. Mar. L. Com. 261, 262-65, 267 (1986).

world's ocean-going ship tonnage if a claim exceeds each Club's individual retention, currently $7 million.

The concept of mutuality underpins the successful operation of risk and claims sharing amongst member shipowners at the individual Club level, i.e., claims within the Club retention and between Clubs at the pooling level, i.e., claims in excess of Club retention. The pooling of claims is achieved by way of the pooling agreement, which, inter alia, defines the risks and claims that can be pooled and provides the mechanism by which pool claims, i.e. those claims that exceed each Club's individual retention up to approximately $6 billion per occurrence, are shared amongst the Clubs (although claims between $50 million and $3.05 billion each and every occurrence are protected by market reinsurance purchased collectively through the International Group). The pooling or mutualizing of risks reduces financial volatility for individual Clubs, since the individual Club does not itself have to meet a large claim in a short time frame, but pools/shares it with other Group Clubs. However, the pooling mechanism is structured in such a way that over time each individual Club will repay to the pool what it takes from the pool. No premium is paid by Clubs with respect to pool claims; each Club's contribution to such claims is calculated in accordance with the mechanism contained in the pooling agreement, which in part will depend upon the tonnage entered with the individual Club, the premium paid by that Club's members to the Club and the Club's pool

claims record. As these factors vary from policy year to policy year so will a Club's contribution to the pool.

Club policy terms are set out in each Club's Rules. As will be appreciated, Club Rules cannot and do not differ in substance because of the pooling arrangements.

Mutual insurance depends upon known and predictable liability regimes. The basic premise, which the Clubs apply when determining what risks they collectively will cover and the extent of that cover in relation to any particular risk, for example loss and damage to cargo, is whether the risk can be mutualized, that is whether it is a risk common to the great majority of the Clubs' memberships and whether members will be exposed to the same or similar liability in relation to the risk. Accordingly the Clubs, when determining the benchmark for the cover that they will provide, will look to widely adopted and well-established liability regimes. In the case of contracts for the carriage of cargo by sea, the liability cover provided by the Clubs in all but very limited cases, is that established by the Hague, the Hague/Visby Rules and COGSA liability regimes.[20] Claims that a carrier by sea incurs under a contract on terms less favorable than Hague or the Hague/Visby are not covered to the extent they exceed the Hague or Hague/Visby liabilities although Clubs have a discretion to admit such claims.

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[20] *See* note 4.

The Carmack Amendment has no standard limitation of liability. Instead, Carmack permits U.S. inland carriers to agree to varying limitations of liability and other contractual terms if certain conditions are met. The parties to contracts for interstate carriage may and do agree to various different amounts of liability for different contracts. Limits vary from railroad to railroad, from trucker to trucker, and from contract to contract. The resulting inconsistency prevents uniformity of risks, which is necessary for mutual insurance. If the opinion below were not overturned and if Carmack were applied as it was in the decision below, the Clubs might well impose a penalty for those members trading in the high risk area of the United States, where Carmack Amendment rulings are common. If the Clubs know that over a period of time claims will deteriorate due to application of Carmack to multimodal carriage, premiums would likely be adjusted upwards for individual members trading in such areas, or possibly a surcharge would be imposed on insuring the U.S. inland portion of multimodal carriage.

In addition to the uncertainty of the liability limit applicable in any particular case, the expense of resolving disputes would be increased by the expense of determining where the damage occurred or was caused. If cargo were lost or damaged sometime during a multimodal carriage, and Carmack applied to a portion of the carriage, the location of the cargo at the time the loss or damage occurred or was caused would have to be determined before the parties could

know which law governed the loss or damage. This requirement would needlessly increase the cost of discovery and claims handling and would delay the claims handling procedure. If COGSA applied throughout the multimodal carriage, there would be no need to prove where the damage was caused or occurred.

II. THE CARMACK AMENDMENT DOES NOT GOVERN CARRIAGE BETWEEN A NON-ADJACENT FOREIGN COUNTRY AND A PLACE IN THE UNITED STATES.

The Carmack Amendment's jurisdiction is limited to carriage from one state or territory of the United States to another, or between an adjacent foreign country and a place in the United States. Prior to 1978, the plain text of the Carmack Amendment clearly limited its foreign carriage scope to carriage "from any point in the United States to a point in an adjacent foreign country," i.e. exports to Canada and Mexico. 49 U.S.C. § 20(11) (1976); Pet. App. 98a; *see also Aaacon Auto Transp., Inc. v. State Farm Mut. Ins. Co.*, 537 F.2d 648, 652 n. 7 (2d Cir. 1976) (quoting 49 U.S.C. § 20(11)). When Congress recodified the statute in 1978, Congress linked the description of Carmack's scope of application to the jurisdiction of the Interstate Commerce Commission, later the

Surface Transportation Board.[21] The jurisdiction of the Surface Transportation Board was described in the recodification as shipments "between a place in . . . the United States and a place in a foreign country." *See* 49 U.S.C. § 10501(a)(2); Pet. App. 62a. It has been argued that this language suggests that the Carmack Amendment applies to all exports and imports between the United States and all foreign countries and has drastically amended the scope of application of Carmack. *See* Michael F. Sturley, *Maritime Cases About Train Wrecks: Applying Maritime Law to the Inland Damage of Ocean Cargo*, 40 J. Mar. L. & Com. 1, 34 (2009).[22] This argument is contrary to Congress's expressed intent not to change the law by recodification and is contrary to the law concerning recodification.

Despite the omission of the "from . . . to" and "adjacent" language in the jurisdictional statement in the 1978 recodification, Congress has made it clear that it did not intend the recodification to change the

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[21] The Surface Transportation Board is the successor to the Interstate Commerce Commission.

[22] Nevertheless, Professor Michael F. Sturley has explained that recodification is "not intended to make any substantive change in the law." *See* Michael F. Sturley, "Reflections on the Recodification of Title 46", 2 *Benedict's Maritime Bulletin* 209, 212 (2004). Professor Sturley basically argues that Congress intended to make substantive changes even though Congress stated in the introduction to the recodification bill that was not the intent, and even though recodification does not make substantive changes.

substance of the Carmack Amendment. *See Riduco, S.A. v. A.P. Moller-Maersk A/S*, Civ. No. 08-3008, 2009 WL 4680197, *3 (N.D. Ill. Dec. 7, 2009) ("because this language was added as part of the recodification of the Interstate Commerce Act in 1978, and the re-codification was not intended to work a substantive change, the language must be read in conjunction with the pre-1978 Interstate Commerce Act.") (citing *Keene Corp. v. U.S.*, 508 U.S. 200, 209 (1993)). Accordingly, the Carmack Amendment should not apply to shipments between the United States and a non-adjacent foreign country that are governed by a through bill of lading.[23] The Fourth, Sixth, Seventh, and Eleventh Circuits have all held that the Carmack Amendment does not apply to the inland leg of a multimodal shipment under a through bill of lading. *See, e.g., Shao v. Link Cargo (Taiwan) Ltd.*, 986 F.2d 700 (4th Cir. 1993); *American Road Service Co. v. Consolidated Rail Corp.*, 348 F.3d 565 (6th Cir. 2003);

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[23] In *Toshiba Int'l Corp. v. M/V Sea-Land Express*, 841 F. Supp. 123, 128 (S.D.N.Y. 1994), Judge Leval explained that a "through bill of lading is one which governs the entire course of transport and applies to the connecting carriers despite the fact that they are not parties to the contract." (Citing *Capital Converting Equip., Inc. v. LEP Transp., Inc.*, 965 F.2d 391, 394 (7th Cir. 1992)). The Clubs and Group respectfully agree with Judge Leval's holding in this case that "whether the limitation provided by the bill of lading extends its protection to . . . inland carriage also turns on whether it is a 'through bill of lading.' If so, the Carmack Amendment, which might otherwise apply to the inland portion of the journey and disallow a limitation on liability, does not apply." *Id.* (citing *Capital Converting Equip.*, 965 F.2d at 394).

Capital Converting Equip., Inc. v. LEP Transp., Inc., 965 F.2d 391 (7th Cir. 1992); *Swift Textiles, Inc. v. Watkins Motor Lines*, 799 F.2d 697 (11th Cir. 1986).[24] These holdings are consistent with Congress's intent to continue to limit the Carmack Amendment's application only to domestic shipments or shipments between the United States and an adjacent foreign country.

In *Riduco, S.A.*, 2009 WL 4680197, at *2, the Northern District of Illinois recently considered whether the Carmack Amendment applies to an international multimodal shipment from the United States to Columbia, covered by a through bill of lading. The court noted the circuit split on the issue of whether the Carmack Amendment applies in cases involving imports from a non-adjacent foreign country under a through bill of lading. *Id.* at *4. The court was guided by the Seventh Circuit's decision in *Capital Converting Equip., Inc. v. LEP Transp. Inc.*, 965 F.2d 391, 394 (7th Cir. 1992) which held that the Carmack Amendment did not apply to a shipment between a non-adjacent foreign country and the United States that was covered by a through bill of lading. *Id.* at *2. The *Riduco* court explained that "[d]espite the omission of the 'from . . . to' and

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[24] By contrast the Ninth Circuit in the opinion below, and the Second Circuit in *Sompo Japan Ins. Co. v. Union Pacific R.R. Co.*, 456 F.3d 54, 68-69 (2d Cir. 2006), have erroneously held that the Carmack Amendment applies to the inland leg of a continuous multimodal shipment.

'adjacent' language in the 1978 recodification of the Carmack Amendment, Congress made it clear that it did not intend to work a substantive change in the law." *Id.* at *3. Accordingly, the *Riduco* court held that "the Carmack Amendment does not apply to the shipment in this case from the United States to Columbia, a non-adjacent foreign country, under a through bill of lading." *Id.*

Congress's intent was made clear in the introduction to the recodification which states, "to revise, codify, and enact *without substantive change* the Interstate Commerce Act and related laws as subtitle IV of title 49, United States Code." 1978 Recodification, Pub. L. No. 95-473, 49 U.S.C. § 10501 [Carmack], 92 Stat. 1359 (1978) (emphasis added); Pet. App. 90a. Additionally, a House Report regarding the 1978 recodification explains that "[l]ike other codifications undertaken to enact into positive law all titles of the United States Code, this bill makes no substantive change in the law." H.R. Rep. No. 95-1395, at 9, *reprinted at* 1978 U.S.C.C.A.N. 3009, 3018:

> It is sometimes feared that mere changes in terminology and style will result in changes in substance or impair the precedent value of earlier judicial decisions and other interpretations. This fear might have some weight if this were the usual kind of amendatory legislation where it can be inferred that a change of language is intended to change substance. In a codification statute, however, the courts uphold

> the contrary presumption: the statute is intended to remain substantively unchanged.

Moreover, it is widely accepted that when interpreting a recodification it should be presumed that the law is intended to remain substantively unchanged. *See, e.g., Keene Corp. v. U.S.*, 508 U.S. 200, 209 (1993) (courts should not presume that a comprehensive revision "changed the underlying substantive law unless an intent to make such a change is clearly expressed."); *U.S. v. Booky*, 733 F.2d 1335, 1337 n. 3 (9th Cir. 1984) (finding language present in original section of code, but absent in recodified section, must be read into recodified section when absence of language creates a substantive change); *Atchison, Topeka and Santa Fe Railway Co. v. U.S.*, 617 F.2d 485, 491 (7th Cir. 1980) ("Congress has unequivocally forbidden any interpretation that would substantively change the [Interstate Commerce Act]").

Furthermore, the argument that the Carmack Amendment applies to shipments to and from non-adjacent foreign countries is erroneous as it conflicts with the original purpose of the Amendment. In 1887, Congress enacted the Interstate Commerce Act and established the Interstate Commerce Commission for the purpose of establishing uniform law applicable to interstate shipments. *See* Interstate Commerce Act, ch. 104, § 11, 24 Stat. 379, 383 (1887); William C. Baldwin, *Land Versus Sea; Carmack Versus COGSA: Why the Carmack Amendment Should Not Apply to Inland Portions of Multimodal Shipments*, 82 Tul. L.

Rev. 731, 737-38 (2007). The 1906 Carmack Amendment to the Interstate Commerce Act applied originally only to interstate commerce and did not apply to foreign shipments of any kind. 49 U.S.C. § 20(11) (1976). The Amendment originally read: "That any common carrier . . . receiving property for transportation from a point in one State to a point in another State shall issue a receipt or bill of lading therefor. . . ." An Act to Regulate Commerce, ch. 3591, 34 Stat. 593 (1906); Harvard Law Review, *Foreign Commerce and the Interstate Commerce Act*, 40 Harv. L. Rev. 1130, 1134 n. 21 (1927); *J.H. Hamlen & Sons Co. v. Illinois C.R. Co.*, 212 F. 324 (E.D. Ark. 1914).

The addition of the Cummins Amendments in 1915, by express reference brought the liability of a carrier engaged in transportation "from a point in the United States to a point in an adjacent foreign country" within the scope of the Carmack Amendment. *See* 40 Harv. L. Rev. 1130. The Amendments did not include non-adjacent foreign countries. Accordingly, courts routinely held that the Carmack Amendment was not applicable to shipments to and from non-adjacent foreign countries. *See, e.g., Missouri P. R. Co. v. Porter*, 273 U.S. 341 (1927) (Carmack Amendment inapplicable to a bill of lading for a shipment of a load of cotton being shipped from the State of Georgia to England because England was a non-adjacent foreign country); *Cudahy Packing Co. v. Munson S.S. Line*, 22 F.2d 898 (2d Cir. 1927) (Carmack Amendment inapplicable to a suit by a shipper of hams from Iowa to Havana, Cuba because

Cuba was a non-adjacent foreign country). Although the Carmack Amendment has been further amended and recodified, nothing has changed the original purpose or the substance of the Carmack Amendment regarding its inapplicability to shipments to and from non-adjacent foreign countries.

Congress's original purpose in enacting the Interstate Commerce Act and later the Carmack Amendment was to create a uniform statutory framework for the carriage of cargo domestically and between the U.S. and adjacent countries. To stray from Congress's intent by applying the Carmack Amendment to the carriage of cargo between non-adjacent countries and the United States destroys uniformity and drastically undermines the original purpose of the Interstate Commerce Act and the Carmack Amendment.

III. THE PRACTICAL RESULT OF THE DECISION OF THE LOWER COURT IN THIS MATTER IS OPPOSITE TO THE RESULT ACHIEVED BY THIS COURT IN *NORFOLK SOUTHERN RY. CO. V. JAMES N. KIRBY PTY LTD.*

This Court explained the advantages of uniform law governing multimodal carriage in *Norfolk Southern Ry. Co. v. James N. Kirby Pty Ltd.*, 543 U.S. 14 (2004).

Kirby presented multimodal carriage that was slightly more complicated than the carriage in this case. In *Kirby*, the shipper of cargo (Kirby) contracted

with a Non-Vessel Operating Common Carrier (NVOCC) to carry cargo from Sydney, Australia to Huntsville, Alabama. The NVOCC contracted with a Vessel Operating Common Carrier (VOCC) also to carry the cargo from Sydney to Huntsville, Alabama. The VOCC contracted with a railroad (Norfolk Southern) to carry the cargo over land from the U.S. port of entry, Savannah, Georgia, to Huntsville, Alabama. The contract for the entire shipment was evidenced by the NVOCC through bill of lading issued to Kirby, and by the VOCC through bill of lading issued by the VOCC to the NVOCC. *Kirby*, 543 U.S. at 19.

This Court held that the bill of lading was a maritime contract, and therefore, was governed by federal law. The Court stated:

> Likewise, a single Himalaya Clause can cover both sea and land carriers downstream. . . . Confusion and inefficiency will inevitably result if more than one body of law governs a given contract's meaning. As we said in *Kossick*, when "a [maritime] contract . . . may well have been made anywhere in the world," it "should be judged by one law wherever it was made." Here, that one law is federal.

Id. at 29 (citing *Kossick v. United Fruit Co.*, 365 U.S. 731, 741 (1960)). This Court explained that the defenses and limitations in the NVOCC bill of lading

protected all the parties that helped perform the multimodal carriage, including the railroad.[25] The limitation contained in the VOCC bill of lading was lower than the NVOCC's bill of lading limitation and there was no direct contract between Kirby and the VOCC. This Court held that the NVOCC had acted as Kirby's limited agent to bind Kirby to the limitation contained in the VOCC's bill of lading. The lower VOCC limit was extended to the railroad by the Himalaya Clause in the VOCC's bill of lading.

The case at bar is simpler and no limited agency theory is necessary. The cargo shipper, Regal-Beloit Corporation, et al. contracted with Kawasaki Kisen Kaisha, Ltd. (K-Line) to carry cargo from China to various inland destinations in the United States. K-Line's U.S. agent, K-Line America, contracted with the Union Pacific Railroad Company (UPRR) for the inland carriage. K-Line Pet. App. at 9.

Kirby's reasoning applies a fortiori here: It suggests that K-Line's Himalaya Clause extended the

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[25] As COGSA permits, Hamburg Süd in its bill of lading chose to extend the default rule to the entire period in which the machinery would be under its responsibility, including the period of the inland transport. Hamburg Süd would not enjoy the efficiencies of the default rule if the liability limitation it chose did not apply equally to all legs of the journey for which it undertook responsibility. And the apparent purpose of COGSA, to facilitate efficient contracting in contracts for carriage by sea, would be defeated.

Kirby, 543 U.S. at 29.

terms of K-Line's contract, including a choice of forum clause, to the railroad. K-Line would of course be entitled to that choice of forum clause as well. *See Vimar Seguros Y Reaseguros, S.A. v. M.V. Sky Reefer*, 515 U.S. 528, 541 (1995) (holding that foreign arbitration clauses in a bill of lading are valid under COGSA). However, the decision below is in conflict with the reasoning of *Kirby*, and if the decision below is upheld more than one body of law will govern the multimodal contract at issue here. Reversal of the lower court decision in this case will allow parties to contracts for multimodal carriage to enjoy the efficiencies described by this Court in *Kirby*.

IV. THE RESULT BELOW IS IN TENSION WITH THE WELL-REASONED POSITION OF THE UNITED STATES IN RECENTLY COMPLETED TREATY NEGOTIATIONS FOR THE ROTTERDAM RULES, WHICH IS THAT ONLY ONE LAW SHOULD GOVERN ALL ASPECTS OF INTERNATIONAL, MULTIMODAL, DOOR-TO-DOOR CARRIAGE OF GOODS.

The United States played an active role in negotiating a Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, which was recently completed by the United Nations Commission on International Trade Law (UNCITRAL) and approved on December 11, 2008 by

the United Nations General Assembly.[26] It was signed in Rotterdam on September 23, 2009 by several nations including the United States. The Rotterdam Rules will not affect the decision in this case. The lower court opinion in this case, if allowed to stand, would however prevent one law from governing the entire door-to-door multimodal carriage whether that one law were COGSA or the Rotterdam Rules.

The United States stated its position[27] during the Rotterdam Rules negotiation as follows:

> I. Scope of application and performing parties . . .
>
> > 5. As part of the overall package, the United States supports a door-to-door regime on a uniform liability basis as between the contracting parties, subject to a limited network exception. This means that the contracting carrier's liability to the cargo interests would always be resolved under the Instrument's own substantive liability provisions (including the Instrument's own limitation and exoneration provisions) except when the network principle

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[26] UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, Dec. 11, 2008 General Assembly Resolution 63/122, Annex, U.N. Doc. A/RES/63/122.

[27] UNCITRAL, 12th Sess., Working Group III at 3, A/CN.9/WG.III/WP34 (Aug. 7, 2003) *available at* http://daccessdds.un.org/doc/UNDOC/LTD/V03/869/05/PDF/V0386905.pdf?OpenElement.

> applies to supersede these provisions. To provide the maximum degree of uniformity possible, we would keep the network exception as narrow as possible. The narrow network exception contained in article 4.2.1 of the Draft Instrument would be acceptable to the United States.[28]

The network exception referred to a desire by European Nations to have their road and rail conventions[29] govern damage or loss on European roads or rails.

While the Convention will govern a multimodal carrier's liability to cargo interests during U.S. inland carriage, it will not apply directly to the railroad or trucking company acting as subcontractor to the carrier and referred to by the Rotterdam Rules as a "performing party."[30] The United States indicated that the carrier's Himalaya Clause should preserve

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[28] *Id.* The 2003 draft of the Instrument, A/CN.9/WGIII/WP.21, was referred to when discussing the narrow network exception. It may be found at Article 26 in the Rotterdam Rules. It does not affect the U.S. inland part of a multimodal move.

[29] *See* Convention on the Contract for the International Carriage of Goods By Road (CMR), May 19, 1956, 399 U.N.T.S. 189; Appendix B to the Convention Concerning International Carriage by Rail (COTIF) of May 9, 1980, and Uniform Rules Concerning the Contract for International Carriage of Goods by Rail (CIM), 2 International Transport Treaties, V-213 (Wolters Kluwer, Supp. 1-10 Jan. 1986).

[30] Rotterdam Rules, Article 1(6)(a).

uniformity by applying the carrier's defenses to the railroad or motor carrier:

> With regard to other performing parties, the Instrument should not create new causes of action or preempt existing causes of action. For example, the liability of an inland carrier (e.g., a trucker or a railroad) should be based on existing law. In some countries, this may be a regional unimodal convention. . . . In others, it may be a mandatory or non-mandatory domestic law governing inland carriage, or the generally applicable tort law. In some countries, cargo interests may not have a cause of action against inland performing parties. Preserving the status quo in this regard would, of course, preserve whatever rights an inland performing party may have under applicable national law to rely on a Himalaya clause to claim the benefit of the contracting carrier's rights under the Instrument. The Instrument should neither increase nor decrease these existing rights.

Id. ¶ 7.

The present and future reliance by U.S. inland carriers on Himalaya Clauses would be destroyed if the lower court opinion were allowed to stand. To interpret Carmack contrary to the clear meaning and intent expressed by Congress before the 1978 Recodification and specifically prescribed by the recodification bill would severely harm the uniformity described in *Kirby* and the uniformity sought by the

United States in the future Rotterdam Rules and would increase the expense of U.S. foreign trade.

CONCLUSION

The judgment of the United States Court of Appeals for the Ninth Circuit should be reversed.

Dated: New York, New York
December 30, 2009.

Respectfully submitted,

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AMICUS CURIAE BRIEF

Nos. 08-1553 & 08-1554

IN THE

Supreme Court of the United States

KAWASAKI KISEN KAISHA, LTD., *et al.*,

Petitioners,

-and-

UNION PACIFIC RAILROAD CO.,

Petitioner,

v.

REGAL-BELOIT CORPORATION, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* TRANSPORTATION AND LOGISTICS COUNCIL AND AMERICAN INSTITUTE OF MARINE UNDERWRITERS, IN SUPPORT OF THE RESPONDENTS

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

The Transportation & Logistics Council, Inc. is a not-for profit organization of some 350 companies that are principally manufacturers, shippers and receivers of freight nationwide. *See* www.tlcouncil.org. The Council's members are transportation and logistics professionals who are responsible for the shipping, receiving and distribution needs of their companies. Among the various functions these transportation professionals are responsible for are administration of claims for loss, damage and delay, freight charge auditing and payment, cargo insurance, carrier selection, and the negotiation of transportation agreements with motor, rail, air and ocean carriers.

The American Institute of Marine Underwriters (AIMU), a non-profit association, represents 36 United States marine insurance companies which underwrite approximately 90 percent of the marine risks insured in this country. AIMU thus serves as an advocate, source of information and center for education. *See* www.AIMU.org. In 2008, AIMU's members underwrote marine insurance policies with collective premiums of more than $2.6 billion. The insured value of the goods and vessels insured under their policies total hundreds of billions of dollars. More than a third

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[1] Both Petitioners and the Respondents have filed blanket consents to the filing of *amici* briefs. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

of those insured values represent cargo shipped in United States foreign trade, including through multimodal shipments such as the one involved in this case. AIMU, on behalf of its members, works in cooperation with the United States Government and international bodies to improve the legal environment for international trade (such as in connection with the recently-signed Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea- "The Rotterdam Rules").

INTRODUCTION

Shippers come in all shapes and sizes

A shipper could be a small start-up company designing ultra-efficient batteries for electric cars. A shipper could be an artist, right out of school, who is selling her first sculpture. A shipper could be an executive, retiring to the south of France, transporting his most precious personal heirlooms. A shipper could be a giant like Wal-Mart, though in most cases, shippers are not massive enterprises. Statistically, 97.3% of all American exporters are small businesses (defined as having fewer than 500 employees).[2]

At some point, for every shipper, and for every importer, there will be a shipment that goes astray. If the value is small, and there is no compensation, it will be a bad day. If the value is large, and there is no compensation, it could mean bankruptcy.

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[2] SBA, Office of Advocacy, *Frequently Asked Questions, available at* http://www.sba.gov/advo/stats/sbfaq.pdf.

This Court's decision in the pending matter will thus have a significant impact on the rights and obligations of nearly every shipper and importer in America.

The one thing that everyone agrees upon is that shippers, particularly America's 17 million small businesses, accounting for 51 percent of our nation's sales,[3] cannot adequately defend their interests in negotiations with carriers absent a regulatory framework. That is why virtually every major country in the world has enacted some legal framework for negotiations concerning ocean, trucking, or rail shipments. That is why the Carmack Amendment was enacted in 1906, and that is why the Carriage of Goods by Sea Act was enacted in 1936. Even today, the United States government concedes that:

> . . . a certain inequality of bargaining power between the shipper and the carrier is assumed to exist.[4]

The government made that statement in the context of the international ocean liner industry, wherein, as discussed *infra*, 20 companies control 80% of the market share.

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[3] U.S. DEP'T OF LABOR, OFFICE OF DISABILITY EMPLOYMENT POLICY, SMALL BUSINESS IN AMERICA, *available at* http://www.dol.gov/odep/pubs/ek00/small.htm.

[4] Mary Helen Carlson, *U.S. Participation in the International Unification of Private Law: The Making of the UNCITRAL Draft Carriage of Goods by Sea Convention*, 31 TUL. MAR. L.J. 615, 625 (Summer 2007).

The railroad industry is such that four mega-railroads[5] account for 95% of the industry's traffic. WILLIAM J. AUGELLO, TRANSPORTATION LOGISTICS AND THE LAW 31 (1st ed., Transportation Consumer Protection Council, Inc. 2001). For America's 17 million small businesses to fairly and effectively negotiate with them, absent some regulatory framework, is simply impossible. Indeed, these four mega-railroads, which operate under anti-trust immunity, under subchapter IV of Title 49, control over 107,500 miles of railroad track in this country. As to be expected, their dominance has been enormously profitable for them, with multi-billion dollar profits for the first 9 months of 2009.[6] *See* Oligopoly Watch, *Industry brief: US railroads* (Nov. 1, 2003), *at* www.oligopolywatch.com/2003/11/01.html. It is a matter of public knowledge that the net result of having such few railroads control the vast majority of the industry's business is that a virtual monopoly exists in each region of the country, providing shippers with a single option for transporting their goods by rail in a given region.[7]

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[5] These four railroads are the Petitioner Union Pacific, as well as Burlington Northern Santa Fe ("BNSF"), CSX Corporation and Norfolk Southern. WILLIAM J. AUGELLO, TRANSPORTATION LOGISTICS AND THE LAW 31 n.50 (1st ed., Transportation Consumer Protection Council, Inc. 2001).

[6] SURFACE TRANSP. BOARD, CLASS 1 RAILROAD ANNUAL REPORT, *available at* http://www.stb.dot.gov/stb/industry/econ_reports.html.

[7] Union Pacific and BNSF dominate the West, and CSX and Norfolk Southern dominate the East. *See* Oligopoly Watch, *Industry brief: US railroads* (Nov. 1, 2003), *at* www.oligopolywatch.com/2003/11/01.html.

Any argument that an individual shipper or a small business has either the means or the economic clout to rewrite a Chinese jurisdiction clause in a preprinted form bill of lading or to insist that Union Pacific offer it a full liability option to carry its goods is just as preposterous as arguing that a consumer renting a car can effectively rewrite a car rental contract. In the real world it simply does not happen unless a consumer friendly framework exists in the form of the Carmack Amendment's protective structure, which does not insure a particular outcome in terms of the venue and liability options being offered, but does require a fair process and at least some choices.

Put simply, this case is about giving effect to Congress' intent that the U.S. Railroads operate within a regulatory framework which requires them to offer reasonable jurisdictional and liability contract options – not outcomes – to rail shippers of goods as a condition of possessing such extraordinary regional monopolies. The alternative would be to create a regulatory vacuum, allowing Railroads to end run the Carmack Amendment's liability and venue provisions, thereby creating serious disuniformity in outcomes, drastically increased litigation costs for American businesses, and serious disincentives for carriers to adequately invest in caring for cargo.[8]

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[8] An example of the type of clauses which railroads unilaterally insert in their tariffs can be found in Union Pacific's own MITA which provides, *inter alia*, that it is not liable for damage unless the container is opened and "visibly checked" at the U.S. port of entry (a virtual impossibility) (310 C (c) (9)); that it is not liable unless "clear and convincing" evidence is presented (which completely reverses Carmack's (Cont'd)

SUMMARY OF ARGUMENT

1. As a matter of public policy, keeping cargo cases in the United States promotes certainty in settling such claims. Only a tiny fraction of cargo claims are sent to lawyers to handle or result in litigation. For many decades, the vast majority of such claims have been promptly and amicably resolved by U.S.-based cargo claims adjusters due to the familiar liability and time-bar schemes imposed by Carmack and COGSA. The Carmack Amendment ("Carmack") has covered liability of railroads since 1906 (and of motor carriers since 1935). The statute is presently codified at 49 U.S.C. §11706 (rail) and §14706 (trucking). The U.S. Carriage of Goods By Sea Act ("COGSA") covering ocean carriers was enacted in 1936. 46 U.S.C. § 30701 (Notes).

Each of these longstanding statutes has a unique liability scheme which is very familiar to the claims people in the cargo industry (and their counterparts on the carrier side). COGSA always provides at least one year to file a lawsuit; Carmack always provides at least two years. This certainty provides a window of time in which to pursue amicable settlement without resort to lawyers and the courts. Reversal of the decision below, however, endangers this well-settled scheme and creates a "no man's land" of unregulated cargo movements

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(Cont'd)
presumptions) (310-C (c) (9)); that only its customer or assignee (i.e. the multimodal bill of lading issuer) can make claim (attempting to prevent any claims by the actual cargo owner) (310-C (E)). Master Intermodal Transportation Agreement (MITA). Union Pacific Exempt Circular MITA 2-A, *available at* http://www.uprr.com/customers/intermodal/mita.shtml.

which will almost certainly result in rail carriers asserting (i) foreign jurisdiction clauses as well as (ii) one, two or three month time bars in bills of lading. Thus, rather than the amicable and fair out-of-court settlements promoted by the current framework, reversal of the case below would result in the following: where every meaningful party is American-based, the loss occurs in the United States, and all of the evidence is located in the United States, multimodal cargo claims will nonetheless have to be sent to and resolved by foreign lawyers in a myriad of foreign courts, wherein access to witnesses and evidence will be cost-prohibitive, if accessible at all, and justice will rarely be achieved. *See infra* Point I.

2. Solemn representations of the state of the law were previously propounded by the Association of American Railroads (which includes Union Pacific among its largest members) and by an individual railroad—to a United Nations Committee and in numerous litigations—that the Carmack Amendment did indeed regulate the U.S. leg of all multimodal movements, resulting in these movements being excluded from a proposed new landmark international cargo treaty known as "The Rotterdam Rules." *See infra* Point II.

3. Industry long ago accepted that, as a matter of law, Carmack applies to the U.S. ground transportation leg of an multimodal shipment regardless of whether a separate inland bill of lading is issued. In fact, this Court has already ruled in *Union Pacific R.R. Co. v. Burke*, 255 U.S. 317 (1921) that Carmack does apply in such circumstances. *See infra* Point III.

4. In any event, if not affirmed, under the proper test this matter must be remanded to the District Court to determine the jurisdictional and liability terms of the railroad's domestic waybill. *See infra* Point IV.

5. True uniformity can be accomplished, at virtually no cost, while preserving international and true substantive uniformity, if the transportation industry modifies a single clause already present in most multimodal bills of lading to incorporate and offer a Carmack Amendment option to shippers. *See infra* Point V.

ARGUMENT

I

For Decades the Carmack Amendment Has Been a Vital and Effective Regulatory Framework. Allowing Railroads to End Run Its Venue Provisions for Multimodal Losses Would Create a Regulatory Vacuum, Serious Disuniformity in Outcomes, Drastically Increased Litigation Costs and Serious Disincentives to Invest in Adequate Care for Cargo

Requiring a separate inland bill of lading for the Carmack Amendment[9] to apply to claims against inland rail carriers[10] violates the vital public policy of promoting

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[9] Now codified at 49 U.S.C. § 11706 (for rail carriers) and 49 U.S.C. § 14706 (for motor carriers).

[10] *Amici curaie* do not address the liability of Petitioner Kawasaki Kisen Kaisha Ltd. ("K-Line"). Rather, they rely upon the points asserted in Respondents' brief on this issue and respectfully refer the Court to that brief.

certainty in settlements of cargo claims outside of Court. Indeed, requiring an Oklahoma train derailment to be litigated in a foreign jurisdiction such as Japan, where no witnesses exist (and no depositions are permitted) is in itself so "seriously inconvenient" that it violates the fundamental fairness principles laid down in *M/S Bremen (and Unterweser GmbH) v. Zapata Off-Shore Co.*, 407 U.S. 1, 16 (1972). The *Bremen* test mandates that enforcement of such a clause against a Plaintiff can not be "so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court." *Id.* at 18. Requiring American manufacturers, importers and shippers to sue inland railroads for minor claims in far flung jurisdictions clearly violates the principle set forth in *Bremen*. Indeed, as correctly pointed out by Petitioners, with over 100 separate ocean carriers utilizing the Port of Long Beach alone, each one having its own jurisdiction clause, and given that a single train derailment can easily involve dozens of containers, if the decision below is reversed, it would become the norm for cargo losses in separate containers from one accident to wind up being litigated in a score of different countries, with each American witness involved in turn spending months shuttling from country to country, the most inefficient possible result.

Over $8 trillion of goods are shipped in the U.S. each year. *See* Research and Innovative Technology Administration: Bureau of Transportation Statistics, *Table 1-52: Freight Activity in the United States: 1993, 1997, and 2002, available at* www.bts.gov/publications/national_transportation_statistics/html/table_01_52.html. Over $1 trillion are multimodal shipments. *Id.* Only about .63% of shipments result in a

loss or shortage claim. *Transit Loss Prevention & Security Association Motor Carrier Survey (2005)*, IN TRANSIT, Spring 2006. For most of these shipments, there *is no insurance*. U.S. DEP'T OF TRANSP., CARGO LIABILITY STUDY ¶ 4.1.4, p. 22 (1998), *available at* http://ntl.bts.gov/lib/22000/22900/22922/cargolivab.pdf.

The vast majority of cargo claims are resolved promptly, without litigation. One study found that 97% of cargo claims are resolved within 120 days of filing of the claim. *Transit Loss Prevention & Security Association Motor Carrier Survey (2005)*, IN TRANSIT, Spring 2006. By one estimate less than one quarter of one percent (.25%) of all cargo claims result in litigation. Rail Carriers Cargo Liability Study, Ex Parte No. 403 (I.C.C. Oct. 9, 1981), *reprinted in* WILLIAM AUGELLO AND GEORGE PEZOLD, FREIGHT CLAIMS IN PLAIN ENGLISH (3rd ed. 1995) Vol II, App. 90, p. B-150-151 (also noting that "there is no current problem involving needless [rail] litigation" and "the prevailing reason that claimants commence court action is the inability to secure needed information from the [rail] carrier"). Experienced claims adjusters know that a large portion of these claims are under $1,000 and it is nearly certain that the vast majority are under $10,000.[11]

Why is there such a remarkable rate of resolution of these small claims without resort to the courts? Most claims are resolved between the claims departments of cargo underwriters and claims advisors working for

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[11] Claims under $10,000 are generally subject to the Carmack Amendment but are not subject to jurisdiction in federal court pursuant to 28 U.S.C. § 1337(a).

carriers (or their insurers) without either side *ever hiring attorneys*. These claims personnel are very familiar with the fundamental outlines of the three mandatory liability schemes adopted by Congress:

Carmack: (for inland losses)	Minimum 9 month to claim/*2 years from claim declination to sue*; specific venue in U.S.; limitation of liability if agreed to byshipper; only common law defenses available to carriers.
COGSA:[12] (ocean losses)	*1 year to sue*; $500 per package limit (unless deviation); various defenses (including due diligence); venue not specified, foreign jurisdiction clauses can be upheld.
Montreal Convention:[13] (air losses)	*2 years to sue*; 17 SDR (presently about US $26.00) per kilo limit of liability; limited defenses; specific venue choices

[12] Previously codified at 46 U.S.C. app. § 1300-15; now located in 46 U.S.C. § 30701 (Notes).

[13] Convention for the Unification of Certain Rules for International Carriage by Air (1999).

> (including for United States imports, suit in the United States).

Thus, when a claim lands on their desk, these claims professionals immediately know the ground rules for resolution. They also know that for ocean claims *they have at least one year and for inland claims two years before they need to contact a lawyer.* That is, they knew up until now. Reversal of the decision below will cast a pall of uncertainty over this currently reliable and effective framework by making the resolution of claims wholly dependent on arbitrary time to sue terms (perhaps even one or two months) and obscure and inconvenient forums unilaterally designated by ocean carriers in pre-printed multimodal bill of lading forms. In addition, whether a separate inland bill of lading is issued is, as a practical matter, likewise entirely out of the control of most (especially small) shippers.

As the U.S. Department of Transportation itself found in rejecting calls for a change of Carmack's 2 year time to sue:

> Consideration of efficiency and **international harmony**, as well as the ease of keeping the familiar time limitation, are arguments in favor of continuing the existing time limits. **There are no strong arguments for changing the time limits.**

U.S. DEP'T OF TRANSP., CARGO LIABILITY STUDY ¶ 5.1.6 (1998), *available at* http://ntl.bts.gov/lib/22000/22900/22922/cargolivab.pdf (emphasis added).

Reversal of the holding of the Court below would immediately mean that Carmack's minimum 2 years to sue does not necessarily apply to interstate multimodal shipments originating from outside the U.S. and would destroy that uniformity and certainty. This, despite the fact that Congressional intent could not have been clearer in the Carmack Amendment that a carrier cannot lessen the two year time to sue:

> A carrier may not provide by rule, contract, or otherwise, a period of less than 9 months for filing a claim against it under this section and a period of less than 2 years for bringing a civil action against it under this section.

49 U.S.C. § 14706(e)(1).

As a result of this Court's legal sea change in *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer,* 515 U.S. 528 (1995), most multimodal bills of lading today covering shipments to and from the United States contain foreign jurisdiction clauses. This is not surprising given that there are no large U.S. ocean carriers remaining, and the vast majority of ships that service our ports today are foreign-owned.[14] And yet, even in the fifteen years

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[14] In 2010, the twenty largest ocean carriers by container volume were identified as follows.* Within particular routes, the choices of carriers are of course considerably narrower.

Rank	Operator	Market Share
1	APM-Maersk (Denmark)	14.9%
2	Mediterranean Shg Co (Switzerland)	11.1%

(Cont'd)

(Cont'd)

3	CMA CGM Group (France)	7.7%
4	Evergreen Line (Taiwan)	4.0%
5	APL (Singapore)	3.9%
6	Hapag-Lloyd (Germany)	3.5%
7	COSCO Container L. (China)	3.3%
8	CSCL (China)	3.2%
9	Hanjin Shipping (Korea)	3.1%
10	NYK (Japan)	3.0%
11	CSAV Group (Chile)	2.6%
12	OOCL (Hong Kong)	2.5%
13	MOL (Japan)	2.5%
14	K Line (Japan)	2.4%
15	Hamburg Sûd Group (Germany)	2.3%
16	Zim (Israel)	2.3%
17	Yang Ming Line (Taiwan)	2.2%
18	Hyundai M.M. (Korea)	2.1%
19	UASC (Middle East)	1.5%
20	PIL (Pacific Int. Line) (Singapore)	1.4%

* *Alphaliner - Top 100 Operated Fleets as per 1 February 2010, at* http://www.axs-alphaliner.com/top100/index.php.

subsequent to the *Sky Reefer* decision, among the scores of reported federal cargo cases filed annually under multimodal bills of lading against railroads and truckers, no one in the various *amicus* briefs filed herein *has cited to a single case against an inland U.S. trucker or railroad that was actually pursued in a foreign forum.* Nor has anyone cited a prior case where an inland carrier moved to dismiss based upon a foreign forum selection clause. The explanation is simple: American manufacturers, shippers and inland carriers have long operated on the premise that the Carmack Amendment (including its forum selection provisions) controls interstate inland movements, even under multimodal bills of lading. In fact, that very position has been taken in prior litigation by a rail carrier. *See* cases cited under Point II, *infra.*

Should this Court now permit these multimodal bills of lading/contracts of adhesion to apply foreign jurisdiction clauses to U.S.-based railroads and truckers, the practical result will be to bar justice for thousands of cargo claimants, as has in fact indisputably been the result of the *Sky Reefer* decision. One study on the subject concluded that when such forum selection clauses exist, only 11.8% of U.S.-based maritime cases, which were originally pursued here, are ever pursued in a foreign forum:

> Overall, the responses to our survey show overwhelmingly that it is unrealistic to assume that the plaintiff's claim will be pursued in the foreign forum if it is dismissed or stayed from the US court. In only four of the 34 cases about which we received

> responses (or 11.8%) were any steps taken to bring the case before the chosen foreign forum. In one of those four cases, the case was settled 'soon after' proceedings had been instituted in the foreign forum; in another, the claim was held by the foreign forum to be time-barred. Thus, only two of the 34 cases (or 5.9%) proceeded to resolution in the forum designated in the forum selection clause. The large majority of cases (24 out of the 34, or 70.6%) settled or were discontinued after dismissal in the United States, and when there was a settlement, it was almost always settlement at a discount. In half of the cases (17 of the 34 cases, or 50%), we know that no steps were taken to bring the case before the chosen foreign forum; that may also be true in other cases about which we received no response to questions 6 or 7.

R. FORCE AND M. DAVIES, JURISDICTION AND FORUM SELECTIONS IN INTERNATIONAL MARITIME LAW 11 (Kluwer Law Int'l 2005).

This result, that presumably valid cargo claims are simply disappearing, is in fact admitted by *amicus curiae* counsel for the P&I Clubs.[15] By extension, such an extreme rate of deferral in the prosecution of

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[15] Chester D. Hooper, *Forum Selection and Arbitration in the Draft Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, or The Definition of Fora Conveniens Set Forth in the Rotterdam Rules*, 44 TEX. INT'L L.J. 417, 423-25 (2009).

meritorious claims permits foreign carriers to be less careful and to take fewer precautions in caring for U.S. cargoes. Those who damage cargo now routinely get a free ride.

Thus, if the lower Court's decision is reversed, carriers like China Ocean Shipping Company ("COSCO"), for example, that are already legally permitted to force small U.S. importers of goods to sue in China to collect on a $10,000 claim—in itself a gargantuan hurdle rarely jumped—would be in a position to contractually require that such a lawsuit, whether brought against them directly or their U.S. inland carriers, be filed, and service completed, in China within a matter of months. Should a time limit of even one year to sue and serve (as was upheld in *Altadis USA, Inc. v. Sea Star Line LLC,* 458 F.3d 1288, 1290 (11th Cir. 2006)) appear in the bill of lading, since service in China easily takes 6-8 months,[16] the process would have to start long before most cargo insurers have had time to review and investigate the underlying claim and prepare it for subrogation. The net result of reversing the lower Court's ruling would thus be to routinely exonerate foreign carriers like COSCO, and their sub-contractors, from ever having to pay for their negligence. The result? Again, fewer precautions taken and even more negligent conduct with respect to cargoes delivered in the United States.

In contrast, the whole purpose of the 2 year minimum time to sue in Carmack is to give the parties

[16] Information provided by APS International Ltd. based in Minneapolis, Minnesota, a leading provider of service of process abroad.

(and their insurers) sufficient time to investigate and resolve difficult claims without resort to lawyers. If the lower court decision is reversed, parties will have no choice even for small, routine claims but to immediately get on a plane, retain foreign counsel, rush into a foreign court, and hire a foreign process server, thereby effectively adding a one-direction foreign litigation "tax" on American manufacturers.

Ultimately, there are several reasons why allowing the railroad industry to end run the Carmack Amendment could be disastrous for shippers.

First, the structure of the shipping industry is such that alternative freight costs charged by carriers if a value is declared are often prohibitively high.[17] As seen above, just 20 liner service companies control 80% of the world container trade; in contrast, in 2006 the U.S. alone had, as noted above, 17 million small businesses and roughly 248,000 export shippers.[18] For specific routes, the number of carriers are very modest indeed, and with economic retrenchment on the horizon, the numbers will almost certainly get smaller.

Second, it is well known that under the present limits of liability selected shippers (particularly those with

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[17] *See, e.g., Industrial Maritime Carriers (Bahamas), Inc. v. Siemens Westinghouse Power Corp.*, No. 02-30856, 2003 WL 21196176, at *1-3 (5th Cir. 2003) (upholding an *ad valorem* rate of 6% cargo value as reasonable and not a denial of fair opportunity).

[18] U.S. Census Bureau, *Profile of U.S. Exporting Companies* (Apr. 9, 2009), *available at* http://www.census.gov/foreign-trade/Press-Release/edb/2007.

larger resources) purchase their own cargo insurance. This is prudent behavior and to insure one's belongings has long been recognized as a social good. However, a classic agent-principal or third-party payment dilemma then comes into play, wherein shippers are in actuality negotiating on the part of the third-parties. By the time the principals, the cargo underwriters, see the claims – usually years later – such shipper employees may no longer be in a position to be held accountable for their actions. While such a course of conduct should (in theory, and assuming perfect competition) ultimately reach an equilibrium when cargo underwriters adjust their premiums upward to account for the increased exposures, in the meantime, significant societal losses have already been incurred.

Finally, by deregulating railroads and allowing *de minimus* low liability limits (with no choice of Carmack terms) public policy itself is frustrated. Such low liability limits have the unfortunate consequence of stripping incentive for carriers to perform diligently.[19]

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[19] This situation is known as "underdeterrence." As explained by Judge Richard Posner in his classic text ECONOMIC ANALYSIS OF THE LAW (3rd ed., Little Browne 1986) at pp. 186-187:

> To permit the defendant to set up my insurance policy as a bar to the action would result in underdeterrence. The economic cost of the accident, however defrayed, is $10,000, and if the judgment against him is zero, his incentive to spend up to $10,000 (discounted by the probability of occurrence) to prevent a similar accident in the future will be reduced.
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> * * * *

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Having cargo insurers pay for foreign or railroad carrier negligence accomplishes nothing more than to shift the burden of bearing the costs of a carrier's lack of care, caused by underdeterrence, to the manufacturers or buyers of goods. Though cargo insurers would initially foot the bill for such shortcomings, U.S. consumers will ultimately suffer the harm in the form of increased costs resulting from volume contracts which have no liability floor. As the world's largest nation of importers, this, over time, will seriously impact American business.

It is important to keep in mind as set forth in the Second Circuit's detailed analysis in *Sompo Japan Insurance Company of America v. Union Pacific Railroad Company*, 456 F.3d 54, 68 (2d Cir. 2006), that this Court's decision in "*Woodbury* [254 U.S. 357 (1920)] and the Act of February 28, 1920 (ratifying the *Woodbury interpretation*) clearly establishes that the ICC's jurisdiction includes transportation from a foreign country to the United States." The plain language in the present Carmack Amendment confirms that the statute covers the inland portion of the transportation at issue (as discussed in detail in Point I of Respondents' Brief).

The ICC itself, in its Exempt Order 390, 46 Fed. Reg. 14348, 14348-14351 (Feb. 27, 1981), explained that 49

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> If compensation is the only purpose of the negligence system, it is a poor system, being both costly and incomplete. Its economic function, however, is not compensation but the deterrence of inefficient accidents.

U.S.C. § 10502(e), the Staggers Amendment, applied to trailer on flatcar/containers on flatcar (TOFC/COFC) shipments. 49 C.F.R. §§ 1039, 1090, 1300 (1981). As COFC shipments refer to the rail carriage of ocean containers and TOFC refer to the rail carriage of motor carrier trailers, the Commission thus effectively mandated that the Carmack Amendment governs the entire U.S. domestic transportation industry for inland U.S. carriage. *See also Quasar Company v. Atchicson, Topeka and Santa Fe Ry. Co.*, 632 F. Supp. 1106, 1109-1110 (N.D. Ill. 1986).

Hence, even in the face of some ambiguous lower court decisions suggesting the need for a separate inland bill of lading,[20] in view of the *Woodbury* decision, the plain language of Carmack, the ICC Exempt Order, and the fact that rail waybills are issued for virtually all rail carriages (as discussed *infra* Point IV), the transportation industry has operated and acted for decades on the premise that U.S. inland movements of multimodal shipments are covered by Carmack.

[20] *See* cases cited at Respondents' Brief, p. 32.

II

The Railroad Industry Itself Has Repeatedly Insisted That Multimodal Claims Are Subject to the Carmack Amendment. They Are Thus Now Equitably Estopped From "Bait and Switching" American Manufacturers by Arguing Precisely the Opposite

During recent negotiations over The Rotterdam Rules, a recently drafted international convention on cargo claims[21] which is expected to be widely enacted, the American railroad industry used their considerable influence to quash attempts to achieve uniformity in handling cargo claims in the United States by insisting that they were already strictly regulated by the Carmack Amendment with respect to precisely the type of inland multimodal cargo claims at issue in this litigation.[22] Specifically, the very same Association of

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[21] In September 2009, the United States became a signatory to the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (the Rotterdam Rules), G.A. Res. 63/122, Annex, U.N. Doc. A/RES/63/122 (Dec. 11, 2008). If ratified by the President with the advice and consent of the Senate, the Rotterdam Rules would alter the liability regime for international transportation of cargo involving the United States when the transportation is partly by sea and partly by land, but would not cover inland carriers. *See id.* at arts. 12, 17, 18(d). Surprisingly, the discussion of the Convention in the United States' *amicus* brief fails to mention that it will not cover railroads. *See* Brief for the United States as *Amicus Curiae* Supporting Petitioners, p. 11.

[22] Of course, AAR knew that once ratified the treaty terms would be applied in the United States federal courts as the law of the land, and that Carmack would be applicable to inland multimodal cargo claims.

American Railroads (AAR), as are *amicus curiae* here, filed formal comments[23] with UNCITRAL[24] expressing its strong opposition to any proposal that the new regime (then known as "the Draft Instrument") should cover the liability of inland rail carriers:

> The U.S. and Canadian railroad members of the AAR have serious concerns over the application of the Draft Instrument to rail transportation. **There is already an existing and well established system in the U.S. and Canada which governs the liability of rail carriers for loss and damage to goods transported and the rights and obligations of both the rail carrier and the shipper.** This system was promulgated by legislation and developed through litigation and regulatory agency action interpreting and applying the legislation.[25]

(emphasis added).

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[23] *See e.g.*, *Proposals by the International Road Transport Union (IRU)*, at 1, U.N. Doc. A/CN.9/WG.III/WP.90 (Mar. 27, 2007); *Drawing up of a New Convention on the Carriage of Goods by Sea and Extending This Convention to Door-to-Door Transport Operations (Comments on Behalf of the IRU) in UNCITRAL*, Compilation of Replies to a Questionnaire, at 43, U.N. Doc. A/CN.9/WG.III/WP.28 (Jan. 31, 2003).

[24] UNCITRAL ("United Nations Commission On International Trade Law") was the UN commission which studied, held hearings and ultimately drafted the Rotterdam Rules.

[25] Comments on Behalf of the Association of American Railroads (AAR) Relating to the Preliminary Draft Instrument on the Carriage of Goods by Sea in UNCITRAL. *See supra* note 21, U.N. Doc. A/CN.9/WG.III/WP.28, at 32.

In the United States, of course, that "existing and well established system" is the Carmack Amendment. The AAR itself described the Carmack Amendment without qualification as "the statute providing the underpinning upon which the system of liability for loss and damage to [multimodal] transported goods is based." *Id.* at 33 n.3.

The AAR added "that the U.S. and Canada already have in place a uniform and well understood system of handling rail freight loss and damage claims which meet[s] the needs of the parties involved." *Id.* at 33 (footnote omitted). In contrast, "the Draft Instrument would adversely modify the current system applicable to U.S. and Canadian railroads." *Id.* at 34.

The AAR was adamant that "[t]he Draft Instrument's scope should therefore not be extended to apply to the land portion of any cargo transportation to the extent it adversely affects the current liability system applicable to U.S. and Canadian railroads."[26]

In short, the railroads repeatedly, consistently and effectively insisted that any maritime regime should not apply to them, even though it was explicitly being designed to cover on a door-to-door basis for the full multimodal journey, because they preferred to *continue* to be exclusively governed by the Carmack Amendment.

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[26] *Id.* These sentiments were also expressed in the AAR's comments submitted at about the same time to the U.S. Government. *See* Comments on Behalf of the Association of American Railroads, docket no. MARAD-2001-11135-12 (Maritime Admin., Dep't of Transp., filed Sept. 13, 2002).

Commenting on the Railroad's successful Rotterdam Rules lobbying effort, one commentator has now summarized deftly:

> What is the explanation for the Rotterdam Rules' failure to address such an obvious and pressing problem? Why did UNCITRAL not include railroads and motor carriers in the new Convention? The simple answer is that [the railroad] industry does not want it. In both Europe and North America, inland carriers (particularly the railroads) were highly vocal about their desire to be excluded from the new regime.

* * * *

The record thus demonstrates that the railroads' rhetoric about "uniformity" when criticizing *Sompo* is simply empty rhetoric. When faced with the very real prospect of a legal regime that extended the ocean carrier's defenses and limitations inland to protect all of the performing parties involved in multimodal transactions—which is exactly what they say good public policy mandates in the *Sompo* context—they blocked the effort. The record proves that their goal cannot be uniformity. It instead appears that their true goal is simply to reduce their liability for the damages that they have caused. While this may be a good business practice that benefits their shareholders, **uniformity and good public policy have little to do with their position**.

Michael F. Sturley, *Maritime Cases About Train Wrecks: Applying Maritime Law to the Inland Damage of Ocean Cargo*, 40 J. MAR. L. & COM. 1, 36-39 (2009) (emphasis added).

The Railroads have not just wrapped themselves in the shield of Carmack to avoid international regulation; the railroad-side has used it as a sword domestically to reap financial benefits and to avoid judgments (at least where a domestic waybill is also issued). *See, e.g., Nippon Yusen Kaisha v. Burlington Northern and Santa Fe R.R.*, 367 F. Supp. 2d 1292, 1296-98 (C.D. Cal. 2005) (railroad successfully argued Carmack applied to inland U.S. loss on inbound multimodal shipment from abroad); *NYK Line v. Burlington Northern and Santa Fe Ry. Co.*, 222 F. Supp. 2d 1176, 1178-79 (C.D. Cal. 2002) (railroad successfully argued Carmack applied to inland U.S. loss on outbound multimodal shipments); *Burlington Northern and Santa Fe R.R. v. Hyundai Merchant Marine Co.*, No. CV 96-9123-MMM, 1999 WL 1122998, at *8 (C.D. Cal. 1999) (same).

In fact, the case at issue was actually removed from state court by Union Pacific based, in part, on the representation that it was governed by the Carmack Amendment. JA67-68.

Here the Railroads have in effect taken a contrary position in front of the United Nations and now seek to repudiate that position to gain an advantage in later proceedings. The doctrine of judicial estoppel prohibits such gamesmanship. *State of New Hampshire v. State of Maine*, 532 U.S. 742, 749-50 (2001). *See also, Chaveriat v. Williams Pipe Line Company*, 11 F. 3d 1420, 1427

(7th Cir. 1993) ("though called judicial estoppel the doctrine has been applied to proceedings in which a party to an administrative proceeding obtains a favorable outcome that he seeks to repudiate in a subsequent judicial proceeding"). The Railroads got what they wanted—a treaty which does not apply to inland multimodal transport.

Judicial estoppel protects the judicial process by prohibiting parties "from deliberately changing positions according to the exigencies of the moment." *State of New Hampshire v. State of Maine*, 532 U.S. at 750, *citations omitted*. The doctrine prevents the parties from "playing fast and loose with the courts" and the facts. *Id.*

III

In Any Event, This Court Decided Long Ago in *Union Pacific v. Burke* That Carmack Applies to Inland Transport Under a Multimodal Through Bill of Lading Even Though a Separate Bill of Lading Was Not Issued

Long before *Sompo*, this Court itself addressed the issue of whether Carmack applies to the U.S. inland leg under a through bill of lading. In *Union Pacific R.R. Co. v. Burke*, 255 U.S. 317 (1921), a single bill of lading was issued for a shipment via ocean and rail from Japan to New York via San Francisco. The New York Court of Appeals found that the inland loss was subject to the Carmack Amendment:

> Ocean transportation may be conducted under through bills of lading, issued at a

> foreign port, but the classifications and schedules of rates and charges of the inland carrier or carriers must be limited to inland transportation and services, and cannot relate to liability, service, or obligation of the ocean carrier.
>
> The liability of the defendant is not and, under the Carmack Amendment, could not be questioned.

Burke v. Union Pacific R.R. Co., 226 N.Y. 534, 540 (N.Y. 1919). The U.S. Supreme Court affirmed, holding that the inland carriage was subject to common law liability (i.e. Carmack) and that the bill of lading limitation was ineffective because no full liability Carmack option was offered. *Union Pacific R.R. Co. v. Burke*, 255 U.S. 317, 321 (1921).

Since *Burke*, however, there has been confusion as to the applicability of the Carmack Amendment to inland carriers where there is an import shipment moving under a multimodal through bill of lading. Most of the confusion can be traced to *Reider v. Thompson*, 339 U.S. 113 (1950). The Court rejected the rail carrier's argument that Carmack did not apply to the inland U.S. rail carriage. The opinion in *Reider* reflected that Carmack was intended to cover the domestic portion of movements originating in foreign countries:

> The purpose of the Carmack Amendment was to relieve shippers of the burden of searching out a particular negligent carrier from among the often numerous carriers handling an

> interstate shipment of goods. To hold otherwise than we do would immunize from the beneficial provisions of the Amendment all shipments originating in a foreign country when reshipped via the very transportation chain with which the Amendment was most concerned. *Id.* at 119.

Moreover, *Reider* does *not* say what would happen if the inland carrier had not issued a separate bill of lading. Nor does it mention the Court's earlier ruling in *Union Pacific R.R. Co. v. Burke*, which indicates that there was no intention of overruling that decision.

IV

If the Existence of an Inland Bill of Lading is the Critical Factor in Determining the Applicable Law, This Case is Not Ripe for Finally Resolving the Issue of the Carmack Amendment's Applicability. The Railroads Concede that if the Rail Carrier Issued an Inland Bill of Lading the Carmack Amendment Applies. No Discovery Has Been Taken on that Issue. Thus, to Resolve This Issue, This Court Must Remand the Case

In the event this Court determines that the Carmack Amendment does not apply to this rail shipment under the K-Line through bill of lading, its holding in *Norfolk Southern Ry. Co. v. Kirby*, 543 U.S. 14, 15 (2004) compels that the case be remanded to determine whether a domestic waybill was issued by the rail carrier, and if so, the effect of its terms. Discovery on that issue was apparently never conducted and so

the issue could not be fully presented to the District Court. For that reason, in part, the Ninth Circuit remanded this matter, calling it contractually a "factual morass." *Regal-Beloit Corp. v. Kawasaki Kisen Kaisha Ltd.*, 557 F. 3d 985, 1002 n.22 (9th Cir. 2009).

Kirby involved an international multimodal shipment under a through bill of lading from Australia to Huntsville, Alabama via vessel and rail. As is typical, the shipper contracted with a forwarder who contracted with an ocean carrier who contracted with the railroad. The Court recognized that the intermediaries between the shipper and the railroad acted as the cargo owner's agent in contracting for the actual transportation.[27] *Kirby*, 543 U.S. at 17.

It is well known in the industry that railroads universally issue domestic "waybills" to the party they immediately contract with in connection with multimodal shipments — typically the ocean carrier. *See, e.g., Scope Imports, Inc. v. Interstate Commerce Commission*, 688 F. 2d 992, 994 (5th Cir. 1982) (describing the ICC's findings that the typical intermodal shipping documents include the intermodal bill of lading and the railroad "waybills" for the inland carriage to destination); *Sompo Japan Ins. Co. of America v. Union Pac. R.R. Co.*, 456 F.3d 54, 76 (2d Cir. 2006) (remanding case to determine, *inter alia*, whether Carmack was offered via the rail carrier's domestic waybills); on remand *Sompo Japan*

[27] The Court pointed out that although the intermediaries are "not the cargo owner's agent in every sense," they do have authority to bind the cargo owner to a liability limitation. *Kirby*, 543 U.S. at 17.

Ins. Co. of America v. Union Pac. R.R. Co., No. 09 Civ. 1604, 2007 WL 2230091, at *5 (S.D.N.Y. 2007) (finding that Union Pacific's domestic rail waybills, while subject to Carmack, did not offer full Carmack liability terms), aff'd 341 Fed. Appx. 707 (2d Cir. 2009), petition for cert. filed, (U.S. Jan. 4, 2010) (09-787).

A domestic waybill evidences a contract of carriage. "Like bills of lading, waybills are contracts for the carriage of goods." *Sompo Japan Ins. Co. of America v. Union Pac. R.R.*, 456 F.3d 54, 56 n.4 (2d Cir. 2006). *As both Union Pacific and Amicus Curiae Association of American Railroads concede,*[28] *under the terms of the Carmack Amendment and established law, such waybill would satisfy any perceived requirement of a separate inland contract and thereby triggering Carmack. Altadis USA, Inc. v. Sea Star Line, LLC*, 458 F.3d 1288, 1291 (11th Cir. 2006); *American Road Service Co. v. Consolidated Rail Corp.*, 348 F.3d 565, 568 (6th Cir. 2003); *Shao v. Link Cargo (Taiwan) Ltd., Inc.*, 986 F.2d 700, 703 (4th Cir. 1993); *Capitol Converting Equipment, Inc. v. LEP Transport, Inc.*, 965 F.2d 391, 394 (7th Cir. 1992). In other words:

> [I]nland carriers are subject to Carmack Amendment liability when a separate, domestic bill of lading is issued, even though a through bill of lading was issued abroad covering the same transport.

---

[28] *See* Brief for Petitioner Union Pacific, p. 34; Brief for the Association of American Railroads as *Amicus Curiae* Supporting Petitioners, p. 180.

King Ocean Cent. Am., S.A. v. Precision Cutting Serv., 717 So. 2d 507, 512 (Fla. 1998) (*citing Swift Textiles, Inc. v. Watkins Motor Lines, Inc.*, 799 F.2d 697 (11th Cir. 1956)).

It is worth noting that all parties concede that inland domestic rail contracts covering the shipments — known as ERTA's did exist here — specific contracts between Union Pacific and each of the shippers, which incorporate by reference Union Pacific's MITA ("UP Exempt Circular 20-B"), which in turn expressly states that it provides terms and conditions for "Intermodal Shipments." *See* Brief of Petitioner Union Pacific Railroad Co., p. 44. Based upon the foregoing principles, and particularly since Carmack provides that the absence of a bill of lading should not affect substantive rights, this Court could find—even if this turned out to be the rare case where a rail waybill is absent—that Carmack applies.

Under *Kirby,* the ocean carrier (the through bill of lading issuer) is deemed to be the cargo owner's agent in contracting with the rail carrier. Hence the domestic waybill (the contract between the ocean carrier and the railroad) needs to be examined to determine which, if any, terms bind the cargo owner. At the very least, the Court would need to examine the inland waybill to determine if it states directly or indicates the party's intent to have it supersede the multimodal bill of lading terms with respect to the relationship between the cargo interests and the inland carrier on liability or jurisdictional issues. These issues are fact intensive and would thus be more properly addressed in the first

instance by the courts below. Absent an affirmance of the Circuit Court's decision, a remand on this domestic waybill issue is required.

Alternatively, should the Court determine that Carmack does not apply to inland multimodal transportation from abroad, the case must be remanded to determine whether a full liability option was offered to the shipper under federal common law. Long before Carmack, the federal common law required that a full liability option be provided to the shipper. *See Hart v. Pennsylvania R.R. Co.*, 112 U.S. 331, 338 (1884). Thereafter, the common law analysis was incorporated into Carmack cases. *New York, N.H. & H. R.R. Co. v. Nothnagle,* 346 U.S. 128, 135 (1953) (which relied upon a string of cases emanating from the "general common law" decision in *Hart*).[29]

Under the released value doctrine, federal law permits carriers to limit their liability only by express agreement with the shipper, under what is known as the "Hughes Test". Thus, to effectively limit its liability, a carrier must: (1) maintain an approved tariff; (2) obtain a shipper's agreement as to his choice of liability; (3) give the shipper a reasonable opportunity to choose between two or more levels of liability; and (4) issue a bill of lading prior to shipment. *Hughes v. United Van Lines, Inc.* 829 F.2d 1407, 1419-20 (7th Cir. 1987); The

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[29] Thus, Carmack simply incorporates federal common law principles of inland carriage, including the released value doctrine. *See e.g., Hampton v. Federal Express Corp.*, 917 F.2d 1119, 1121 (8th Cir. 1990) (federal common law applies the same released value doctrine as Carmack)

Hughes Test has its genesis in *New York, N.H. & H. R.R. Co. v. Nothnagle*, 346 U.S. 128, 135 (1953).

It is important to keep in mind that the released value doctrine pertains to effective limitations of liability, which is the central issue in numerous cases including *Sompo Japan Ins. Co. of America v. Union Pac. RR.* Co, 456 F.3d 54 (2d Cir. 2006). It is also applicable to the case at bar. That is, there has been no determination below as to whether a full liability option was offered to the shipper under the *Hughes* test, and if so, whether requiring suit in a foreign forum negates such an offer.

V

If the Transportation Industry Really Wants Uniformity, for a *De Minimus* Cost It Can Extend a Single Clause Already Routinely Present in Multimodal Bills of Lading to Cover the United States Trade and Offer Shippers a Carmack Option

The argument is repeatedly made in the various *amicus* briefs that enforcement of K-Line's Japanese jurisdiction clause against the inland U.S. railroad would promote "uniformity."

Actually, precisely the opposite is the case. The United States has few if any major ocean carriers forcing foreign shippers to litigate here. Moreover, as explained in the seminal work W. TETLEY, MARINE CARGO CLAIMS 1915-26 (4th ed. 2008), the very same jurisdiction clauses that our Court's recognize—for claims against ocean

carriers—are unenforceable in whole or in part in at least the following jurisdictions:

- China (noting that as of 1997 only Dutch and German forum selection clauses were enforceable there)
- Canada
- The European Union (clauses enforced only under restrictive conditions)
- Australia
- New Zealand
- South Africa
- France

No showing has been made that a single foreign country currently permits lawsuits against its railroads (or truckers) for their local activities to be routinely venued in and their employees forced to testify in an overseas country. Under Article 31 of the European CMR Convention, for example, a United States forum selection clause would be unenforceable against a European trucker.[30] Pursuant to the CMR, forum selection clauses are only enforceable if the designated forum is that of a participating nation (which in turn would apply the CMR).[31] Nonetheless, the Railroads

[30] *See* Convention on the Contract for the International Carriage of Goods by Road (CMR), May 19, 1956, 399 U.N.T.S. 189.

[31] Similarly, if the Carmack Amendment did apply here, it is well established (and the Railroads do not contest) that a (Cont'd)

want our citizens to have to travel across the globe to seek justice.

Independent of this one-sided situation, a crucial fact exists in this case which independently supports the application of Carmack here. The standard K-Line Bill of Lading (and also the one at issue) contains the following clause, applicable everywhere except the United States:

> Clause 3(B)
>
> Carrier's responsibility, if any, for any loss or damage to Goods proven to have taken place during any period other than Water Carriage shall be governed by any relevant provisions contained in any applicable international convention or national law which provisions (a) cannot be departed from by private contract to the detriment of Merchant, and (b) would have applied if Merchant had made a separate and direct contract with Carrier in respect of the particular stage of Carriage during which the loss or damage occurred.

Available at http://www.kline.com/KAMBL_Terms/BL_Terms_Export_Front_Clauses.asp. In fact, TLC's counsel's experience and published decisions reveal that similar clauses exist in most ocean carrier bills of lading.

(Cont'd)

foreign forum selection clause would not be enforceable. *Aacon Auto Transport, Inc. v. State Farm Mutual Automobile Ins. Co.*, 537 F. 2d 648, 654-55 (2d Cir. 1976).

See, e.g., Hartford Fire Ins. Co. v. Orient Overseas Containers Lines, 230 F. 3d 549, 553 (2d Cir. 2000); *Mannesman Demag Corp. v. M/V Concert Express*, 225 F. 3d 587, 590 (5th Cir. 2000).

As the bill of lading clearly contemplates a multimodal shipment, the reference to "laws compulsorily applicable under the circumstances" to the participating carrier/trucker can only mean inland laws such as the Carmack Amendment (or such as in Europe, the CMR Convention) which apply independent of the issuance of the bill of lading.

The clause thus establishes that K-Line expressly intended different liability schemes to govern different phases or modes of transportation, in virtually every country *except* the United States. A few adjustments to this simple clause to make it indisputedly applicable to the parallel Carmack Amendment, would thereby put U.S. shippers on equal footing with foreign shippers. Instead, the Railroads are now effectively arguing for this Court to put United States shippers in a deeply weakened, completely unregulated, competitively disadvantaged position.[32]

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[32] Professor Sturley, analyzing the decision in *Sompo Japan Ins. Co. of Am. v. Union Pac. R.R.*, 456 F.3d 54 (2d Cir. 2006), notes that more careful contract drafting would provide a complete and virtually cost-free "solution" to this entire debate. Michael F. Sturley, *Maritime Cases About Train Wrecks: Applying Maritime Law to the Inland Damage of Ocean Cargo*, 40 J. Mar. L. & Com. 1, 36-39 (2009). Numerous other *Sompo* critics are in accord. *See* Paul Keane, *US Law -COGSA Limitations and Intermodal Transport*, 192 Gard News 22, 24 (2008).

Finally, it is important to note that nothing in Carmack, either in its present form or its history, suggests that a carrier can make an offer of full liability to anyone other than the actual shipper (the owner of the goods). That is, an offer to another carrier – i.e. from the railroad to an intermodal bill of lading issuer — is simply not authorized by the language in Carmack. For the Court to permit such an offer to be made would be for the Court to legislate and to validate a procedure which Congress never approved. The offer must be made to the actual shipper. *Burke v. Union Pac. R. R. Co.*, 226 NY 534 (1919), aff'd *Union Pac. R. R. Co. v. Burke*, 255 U.S. 317, 321 (1921). It would be a simple matter for the railroads to contract with their multimodal partners to insert an offer of full Carmack liability right in the multimodal bill of lading. In fact, as discussed above, this is exactly what the multimodal carriers have done regarding inland shipments for countries other than the United States. There would be no cost or burden to require the full Carmack option to be specifically included in such a bill of lading clause.

CONCLUSION

The decision of the court below should be affirmed. In the alternative, the case should be remanded to resolve the matter of the existence of and the precise jurisdictional terms of the Railroad's waybill.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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Nos. 08-1553 & 08-1554

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IN THE

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Petitioners,

and

UNION PACIFIC RAILROAD COMPANY,
Petitioner,

v.

REGAL-BELOIT CORPORATION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* THE WORLD SHIPPING COUNCIL IN SUPPORT OF PETITIONERS

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* THE WORLD SHIPPING COUNCIL IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*

The World Shipping Council ("WSC") is a non-profit trade association of 29 companies that operate 36 international shipping lines.[1] WSC's members

[1] In accordance with the Court's Rule 37.6, WSC and its counsel certify that no counsel for a party authored this brief in whole or in part. WSC also hereby discloses that petitioner Kawasaki Kisen Kaisha Ltd. is a member of WSC. Because the expense of preparing this brief was paid from WSC's general budget, petitioner Kawasaki Kisen Kaisha Ltd. contributed in proportion to its share of the organization's membership dues (approximately 3.9%). Pursuant to Court Rule 37.3(a), all parties have consented to the filing of this brief.

include the full spectrum of vessel-operating common carriers, offering containerized, roll-on/roll-off, and car carrier services. WSC's members together provide over ninety percent of the containerized ocean transportation that serves the United States import and export trades.

A substantial percentage of the containerized shipments handled by WSC's members include the type of "through" or "intermodal" arrangements that are at issue in this case. These are shipments for which the ocean carrier takes contractual responsibility for the transportation from origin to destination, including an inland "leg" of the transportation in addition to the ocean "leg," and issues a single "through" bill of lading to the shipper (the entity that owns or controls the cargo) setting forth the terms of that transportation from beginning to end. In order to fulfill its contractual obligations to provide the inland leg of the transportation for shippers desiring through intermodal service, the ocean carrier will have entered into a subcontract—with the shipper's knowledge and consent—with rail and/or motor carriers for the inland portion of the cargo movement.

As in this case, the through bills of lading issued by WSC's members typically include clauses that specify that the Carriage of Goods By Sea Act, 46 U.S.C. 30701 Note ("COGSA"), Pet. App. 48a-61a, shall apply to the inland as well as the ocean components of the transportation, and that the COGSA liability limitations shall extend to railroads and truckers hired by ocean carriers to provide the land transportation portion of the move. Thus, a single and predictable liability rule covers the entire transportation contracted for by the ocean carrier, regardless of whether damage to the goods occurs on the ocean leg,

on the inland leg, or at an undetermined point in the journey (which is commonly the case).

The decision below undermines comprehensive changes that Congress made in the 1980s and 1990s to the statutes that regulate international ocean shipping and domestic rail transportation. In our statement, we summarize these statutory changes, the primary thrust of which was to replace the old tariff system of establishing shipping terms with a new system based on negotiated contracts. We then argue that the Ninth Circuit's reading of the relevant statutory sections violates both the plain language of those sections and the deregulatory goals of Congress. Allowing the decision below to stand would upset bargained-for expectations and could cause substantial disruptions in the way that international ocean transportation services are offered, priced, and insured.

STATEMENT

This Court in *Norfolk Southern Railway Co. v. James N. Kirby, Pty Ltd.*, 543 U.S. 14 (2004), correctly noted that "[t]he international transportation industry 'clearly has moved into a new era—the age of multimodalism, door-to-door transport based on efficient use of all available modes of transportation by air, water, and land.'" *Id.* at 25 (internal citation omitted). The Court also recognized that the changes in the physical manner in which cargo is moved have caused changes in the contractual relationships among the parties to that transportation: "Contracts reflect the new technology, hence the popularity of 'through' bills of lading, in which cargo owners can contract for transportation across oceans and to

inland destinations in a single transaction." *Id.* at 25-26.[2]

In *Kirby*, the Court held that a shipper's damage claim against a railroad providing inland transportation in connection with an international cargo movement was governed by two "through" (end-to-end) bills of lading—one issued by a freight forwarder to the shipper, and one issued to the freight forwarder by the ocean carrier that actually provided the maritime transportation. Reaffirming its decision in *Great Northern R. Co. v. O'Connor*, 232 U.S. 508 (1914), the Court held that an ocean carrier may bind the shipper to a limitation of liability applicable to a "downstream" inland carrier (there, as here, a railroad) under a through bill of lading issued by the ocean carrier. In analyzing the effect of the liability terms of the ocean carrier's bill of lading, the Court held "that intermediaries, entrusted with goods, are 'agents' only in their ability to contract for liability limitations with carriers downstream." *Kirby*, 543 U.S. at 34. Here, as in *Kirby*, the ocean carrier acts

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[2] The facts of this case (and the hundreds of thousands of factually similar intermodal transportation shipments) involve shippers that for their convenience chose to engage an ocean carrier to handle the "through" move, including the inland portion of the transportation, under the ocean carrier's single bill of lading. The shipper knows in advance that the ocean carrier does not itself provide the rail service portion of the transportation, but rather that the ocean carrier arranges for the rail service on behalf of the shipper pursuant to long-term contracts that the ocean carrier will have entered into with the rail carrier. If a shipper wishes to arrange separately for the inland transportation of its goods with a truck or rail carrier and for ocean transportation with an ocean carrier, it is always free to do so.

as an "intermediary" between the shipper and the railroad.

Kirby dealt with the question of how the various transportation arrangers and physical providers relate contractually to one another under a through bill of lading, under which an ocean carrier takes responsibility for arranging for all transportation from inland origin to inland destination. *Kirby* held, based on longstanding precedent relating to contract formation for transportation services, that all of those relationships were governed by COGSA when COGSA was extended inland by contract. The present case adds the question of whether the Carmack Amendment, currently codified with respect to rail carriers at 49 U.S.C. 11706, Pet. App. 69a-70a, changes the rules under which parties may otherwise lawfully and enforceably agree to limit all carriers' liability as part of a contract for through international ocean transportation.

Modern international through transportation contracts have both a legal and a commercial aspect. The legal aspect is not as limited as the "COGSA versus Carmack" formulation enunciated by the Ninth Circuit. Instead, the contracts at issue here can only be properly understood in the context of broader Congressional policies and enactments applicable to both ocean transportation (including through transportation) and rail transportation. International ocean transportation is regulated by the Federal Maritime Commission ("FMC") under the Shipping Act of 1984, as amended, 46 U.S.C. 40101 *et seq.*[3] Service contracts are regulated under 46

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[3] The Shipping Act of 1984, as amended, was recodified and enacted as positive law by P.L. 109-304, 120 Stat. 1523 (2006).

U.S.C. 40502. Rail transportation contracting is covered under the Interstate Commerce Act, as amended by the Staggers Rail Act of 1980 ("Staggers Act"), P.L. 96-448, 94 Stat. 1895 (1980), Pet. App. 79a-84a, and the Interstate Commerce Commission Termination Act, P.L. 104-88, 109 Stat. 803 (1995).

Although we largely leave the specifics of Title 49 of the United States Code (dealing with rail contracting) to the parties, we attempt below to put those provisions into the context of a regulatory and commercial shift that occurred in a roughly contemporaneous manner across all modes of surface transportation. Understanding the shift in the last quarter of the twentieth century from a tariff-based system of transportation to a contract-based system is crucial to a proper understanding of the relevant statutes and the transactions to which they apply.

1. Ocean Service Contracts Under the Shipping Act of 1984.

a. Legal Background of Ocean Service Contracts.

Before the enactment of the Shipping Act of 1984, P.L. 98-237, 98 Stat. 67 (1984), the terms for international ocean transportation were, for all practical purposes, governed solely by publicly filed tariffs that had the force of law under the filed rate doctrine. The 1984 Act introduced the concept of the "service contract," which, as the name suggests, is an individually negotiated contract between an ocean carrier and its shipper customer. Those contracts, however, maintained many of the attributes of tariffs, because the 1984 Act required carriers to make public an extensive list of "essential terms," including geographic scope, commodities covered, and price. Any

similarly situated shipper had a period of time after filing of the essential terms to demand a contract on those same terms—the so-called "me-too" option. *See* Shipping Act of 1984, P.L. 98-237, § 8(c), 98 Stat. 67, 69 (1984) (repealed 1998).

In addition to the fact that service contracts under the 1984 Act had as many aspects of tariff-based common carriage as they did of private contracting, their flexibility was limited by the fact that groups of ocean carriers setting common rates under the "conference" authority of the Act could control the use of service contracts by conference members. At their inception, then, and for some fourteen years thereafter, service contracts under the Shipping Act of 1984, while common, were far less flexible and freely negotiated than typical commercial contracts in industries that are not subject to pervasive economic regulation.

The Ocean Shipping Reform Act of 1998 ("OSRA"), P.L. 105-238, 112 Stat. 1902 (1998), made wholesale amendments to the Shipping Act of 1984. For present purposes, the most significant changes were to the service contracting provisions. OSRA eliminated control over service contracting by conferences (and essentially eliminated conferences), prohibited ocean carrier agreements from interfering in the service contract practices of their members, removed many of the requirements that essential terms (including price) be filed, allowed contract parties to agree to keep their contracts confidential, removed the "me-too" option, and removed contract disputes from the FMC's jurisdiction, sending those disputes

instead to the courts or, upon agreement of the parties, to arbitration.[4]

b. Ocean Service Contracts In Practice.

The practical results of the service contract changes in OSRA were dramatic. Within three years of enactment in 1998, the FMC found that OSRA had resulted in over 80 percent of containerized ocean cargo moving under contract. OSRA Report at 2. Soon after the rules had changed, the Commission found that "[i]n certain major trade lanes, some shippers are now moving nearly 100 percent of their cargo under service contracts." *Id.* at 18. Today, eleven years after OSRA, the trend has continued. Although the confidentiality of contracts makes precise statistics unavailable, WSC's members' experience is that service contracts govern virtually all U.S. international liner shipping transportation in the major trade lanes. Terms routinely addressed in service contracts (some of which terms are also reflected in the bills of lading that are typically incorporated by reference in those contracts) include price, minimum volume requirements, delivery times, availability of equipment, and limitations on liability for both ocean and inland transportation.

In addition to their ubiquity, the other features of international ocean service contracts relevant here are that: (1) they routinely cover intermodal through moves involving inland transportation legs in the United States, (2) depending on the size and business

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[4] For a summary of service contract regulation both before and after OSRA, *see* Federal Maritime Commission, The Impact of the Ocean Shipping Reform Act of 1998, at 16-17 (September 2001) ("OSRA Report"). The OSRA Report is available electronically at http://www.fmc.gov/images/pages/OSRA_Study.pdf.

structure of the shipper, they may address tens or hundreds of different commodities in multiple trade lanes around the world, and (3) they are typically for a minimum period of one year, sometimes longer.

In short, terms in service contracts are negotiated with the purpose of establishing a long-term commercial relationship between the ocean carrier and the shipper covering all (or virtually all) of the business between them. Once those terms are set, any individual shipment covered under that contract, along with the accompanying documentation, is handled as a routine matter of implementing the terms already agreed. Terms—and particularly liability terms—are not re-negotiated with each shipment. This is a high-volume business, with over fifty thousand shipping containers entering or leaving the U.S. every day. If each shipment were the subject of individual negotiation, the international intermodal transportation system simply could not handle that volume.

2. Rail Contracts

a. Legal Background of Rail Contracts.

WSC anticipates that the parties will thoroughly brief the treatment of rail contracts under the Interstate Commerce Act, as amended by the Staggers Act, the ICC Termination Act, and other statutes. WSC wishes only to note that the movement away from a regulated common carrier model and toward a contract-based commercial environment that occurred gradually in the international ocean shipping industry through the Shipping Act of 1984 and the Ocean Shipping Reform Act of 1998 was matched by an earlier and even more dramatic deregulatory shift in the rail industry.

Before the enactment of the Staggers Act, the rail industry, like the international ocean shipping industry before the 1984 Act and OSRA, was a creature of common carrier regulation driven by publicly filed tariff rates. Although the Interstate Commerce Commission ("ICC") attempted in the late 1970s to provide some commercial flexibility by allowing for certain narrowly defined classes of contract carriage,[5] Congress found that the failing rail industry required much stronger medicine. In the Staggers Act, Congress up-ended rail regulation, taking virtually all rail contracts entirely out of coverage by of the statute, and making them subject only to otherwise applicable contract law.

The Surface Transportation Board ("STB") in 2007 described the scope and effect of the contract provisions of the Staggers Act this way:

> Congress viewed the ICC's changed policy as insufficient, because it had "a number of restrictions and uncertainties and [had] resulted in the limited use of contracts." To ensure that shippers and railroads would be free to enter into rail transportation contracts "without concern about whether the ICC would disapprove a contract," in the Staggers Rail Act of 1980 (Staggers Act), Congress amended the statute to provide that railroads "may enter into a contract with one or more purchasers of rail services to provide specified services under specified rates and conditions." Former 49 U.S.C. 10713(a)(1995) (now codified at 49 U.S.C. 10709(a)). When originally enacted, the provision further stated that "a rail

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[5] *See* Change of Policy; General Policy Statement, Ex Parte No. 358-F, 43 Fed. Reg. 58189 (I.C.C. Dec. 13, 1978).

> carrier may not enter into a contract with purchasers of rail service except as provided in this section." Former 49 U.S.C. 10713(a)(1995).
>
> Congress also expressly removed all matters and disputes arising from rail transportation contracts from the ICC's (and now the Board's) jurisdiction. See former 49 U.S.C. 10713(i)(1995) (now codified at 49 U.S.C. 10709(c)). If the parties have a dispute regarding such a contract—such as whether there has been adequate performance or whether the contract is void because it was signed under duress—such matters are to be decided by the courts under applicable state contract law. See former 49 U.S.C. 10713(i)(2)(1995) (now codified at 49 U.S.C. 10709(c)(2)). Congress also explained that, if someone believes that a contract is anticompetitive, "the antitrust laws are the appropriate and only remedy available." Congress considered the contract rate provision of the Staggers Act to be "among the most important in the bill."

Notice of Proposed Rulemaking, Interpretation of the Term "Contract" in 49 U.S.C. 10709, STB Ex Parte No. 669, 72 Fed. Reg. 16316 (April 4, 2007)(footnotes omitted).

b. Role of Rail Contracts in International Maritime Through Transportation.

As a factual and a conceptual matter, contracts between ocean carriers and rail carriers are subcontracts under the service contracts that are negotiated between ocean carriers and their shipper customers. Because ocean carriers do not themselves have the capability to provide rail services, ocean carriers must purchase rail service from railroads if the ocean

carriers are to be able to offer through transportation to their customers.

Because service contracts between ocean carriers and shippers most typically last for at least a year, the ocean carriers must project their costs for that year in advance in order to set their prices to their customers (shippers) with whom they negotiate service contracts. For intermodal through transportation, one of the primary costs for ocean carriers is the inland transportation that they must purchase from rail or motor carriers. Before an ocean carrier can negotiate rates and terms with its customers, it must negotiate with the railroads. Because of the need for predictability of prices and the flexibility to handle a broad range of shipment types under a single contract, contracts between railroads and ocean carriers are typically long-term arrangements that apply common liability limits for all shipments within their scope.

Because the rail contract represents the "small end of the funnel" (i.e., tens of thousands of shippers negotiate with fewer than fifty ocean carriers, who negotiate with a maximum of seven Class I railroads) in terms of contracting for international through transportation, the contracts between ocean carriers and rail carriers must be broad and flexible enough to cover a wide variety of cargoes originating from thousands of shippers. Even more so than in the case of ocean service contracts, contracts between ocean carriers and railroads of necessity must have basic terms that apply to all cargo moved under those contracts. Without the ability to deal with issues such as limitations on liability in such a comprehensive fashion, it would be impossible for ocean carriers to arrange rail carriage in advance so as to allow

those ocean carriers to offer through transportation in their service contracts with their shipper customers.

SUMMARY OF ARGUMENT

First, the Ninth Circuit's holding that "K" Line is a rail carrier because "K" Line subcontracted for rail services that it re-sold under a contract for international through transportation is wrong. The statutory language at 49 U.S.C. 10501(a)(1) regarding rail/water combinations relied upon by the Ninth Circuit to convert "K" Line into a railroad defines certain obligations of rail carriers when they employ water transportation; it does not define who is a rail carrier. In any event, the water transportation over which the Board has jurisdiction does not include international ocean transportation. *See* 49 U.S.C. 13521 (defining STB jurisdiction over water carriers). Finally, treating an ocean carrier issuing a through bill of lading as a rail carrier creates an irreconcilable conflict between the FMC's intermodal jurisdiction under the Shipping Act of 1984, as amended, and the "exclusive" jurisdiction of the STB over railroads. *See* 49 U.S.C. 10501(b).

Second, the Ninth Circuit's holding that the Carmack Amendment applied—even though the rail transportation was provided under a contract that would ordinarily be exempt from Carmack—was premised on the incorrect assumption that transportation that has been exempted under 49 U.S.C. 10502 is outside of the Board's jurisdiction, and is therefore outside of the scope of 49 U.S.C. 10709 (which removes contracts for rail transportation within the Board's jurisdiction from coverage by Carmack and other statutory requirements). Both the statute and

the Board's cases make clear that the issuance of an exemption under 10502 does not divest the Board of jurisdiction. The Ninth Circuit's atextual reading contradicts Congress' plain intent to free rail contracts from regulation by the Board.

Third, even if section 10502 precluded the application of 10709 and instead required a carrier and a shipper to reach a written agreement on alternative terms under 49 U.S.C. 11706(c), the through ocean bills of lading issued by "K" Line satisfy those requirements. Contrary to the lower court's unexplained assumption that a carrier wishing to contract out of Carmack's liability scheme must first offer "full Carmack terms" through some particular (but unspecified) method, the statute does not so require. Any such requirement that arguably existed in the past was based on statutory language that was removed by the Staggers Act and on the related constraints of a tariff-based system in which shipping terms were largely a matter of adhesion. The Staggers Act fundamentally changed that system. To require "magic language" in a negotiation between a shipper and an ocean carrier in order to effectuate an agreement on liability limits under 49 U.S.C. 11706(c) would be inconsistent with the freedom of contract principles embodied in Congressional deregulation of both the international shipping and rail transportation industries.

ARGUMENT

1. "K" Line Is Not a "Rail Carrier."

Many, although not all, of the Ninth Circuit's errors flow from its holding that "K" Line is a "rail carrier" within the meaning of 49 U.S.C. 10102(5); that is, "a person providing common carrier railroad

transportation for compensation." *See* Pet. App. 12a-13a. The Ninth Circuit reached that decision through something of a "ransom note" amalgam of several definitions and jurisdictional statements in the statute. Without unduly repeating points that the petitioners will address, the lower court's conclusion that an ocean carrier becomes a rail carrier by offering a through bill of lading fails for three independent reasons, all of which are suggested in the Second Circuit's recent decision in *Rexroth Hydraudyne B.V. v. Ocean World Lines, Inc.*, 547 F.3d 351, 356-58 (2d Cir. 2008).

First, the decision below never addressed the core question of whether "K" Line was "providing common carrier railroad transportation for hire," 46 U.S.C. 10102(5), the definition of a "rail carrier." The World Shipping Council is not aware of any appellate decision other than the decision under review that holds that an ocean carrier that subcontracts with a railroad in order to provide through transportation to a shipper becomes a "rail carrier" by virtue of that subcontract. That ocean carriers do not become rail carriers through such transactions is supported by consistent ICC and STB rulings on the subject. Just this year, the STB reiterated that "[a]t a minimum, under agency precedent, for an entity to qualify as a rail carrier, it must (1) hold itself out as a common carrier for hire, and (2) have the ability to carry for hire." James Riffin—Petition for Declaratory Order, STB Finance Docket No. 35245, slip op. at 5, 2009 STB Lexis 428, at *8 (Sept. 15, 2009) (footnote collecting cases omitted).

In an earlier decision, the ICC directly addressed the question of whether an international ocean carrier was a rail carrier either by virtue of owner-

ship of rail cars or by virtue of the fact that the ocean carrier subcontracted for rail services that it then offered as part of a through international transportation service that included rail transportation. *See* Joint Application of CSX Corporation and Sea-Land Corporation under 49 U.S.C. § 11321, 3 I.C.C. 2d 512 (Feb. 11, 1987). After rejecting the argument that the ownership of rail equipment was sufficient to bestow rail carrier status, the Commission turned to the central question of whether the ocean carrier held sufficient control over the rail service to be deemed to be "offering" that service within the meaning of the statute. Under circumstances that involved greater involvement in the rail carriage than the mere subcontracting in the present case, the Commission held that "we agree with applicants that neither Sea-Land [the ocean carrier] nor any of its subsidiaries controls the rail service involved here. No evidence has been presented to refute the assertion that all operational aspects of the rail transportation service are controlled by the participating railroads, including scheduling and the right to route traffic and add additional cars. Therefore, as applicants argue, Sea-Land is not operating, performing, or offering rail service." *Id.* at 519; *see also Rexroth*, 547 F.3d at 363-64 (collecting cases requiring "actual operation of trains" for rail carrier classification).

The fact that "K" Line did not "offer" rail transportation for hire—an issue the Ninth Circuit never addressed—ends the inquiry into whether "K" Line is a rail carrier; it is not. There are, however, two other reasons the Ninth Circuit erred on this point. First, its reliance on the provision at 49 U.S.C. 10502(a)(1)(B) dealing with "transportation by a rail carrier that is . . . by railroad and water, when the transportation is under common control, manage-

ment, or arrangement for a continuous carriage or shipment," is misplaced for a least two reasons. The first is that, because that subsection is applicable only to "rail carriers," its application must *follow* a determination that a particular entity is a rail carrier; the subsection cannot be *the basis* of such a determination. Equally fundamental, the Board's jurisdiction over water transportation only applies to the movement of cargo by water between two states, or to state-to-state transportation preceding or following transshipment for international transportation. *See* 49 U.S.C. 13521 (discussed in *Rexroth*, 547 F.3d at 357 n.5 and n.6). Here, the only water transportation was between China and the United States, with no ancillary transportation between any two states. Thus, even if 10502(a)(1)(B) could be used to bootstrap a *domestic* water carrier into rail carrier status, the ruse would still fail here, where the water transportation is international.

Third, the construction adopted by the Ninth Circuit—that an international ocean carrier becomes a rail carrier by subcontracting with a railroad for inland carriage on the shipper's behalf—would create an irreconcilable conflict between the Interstate Commerce Act and the Shipping Act of 1984. This is so because the FMC under the Shipping Act has jurisdiction over inland transportation provided under a through bill of lading issued by an ocean carrier in the foreign commerce of the United States. *See* 46 U.S.C. 40102(12), 40102(24), 40301(a)(1), 40501(a)(1), 40502(c), and 41105(4) (all relating to FMC jurisdiction over inland transportation associated with through movements). 49 U.S.C. 10501(b), on the other hand, provides that the "jurisdiction of the Board over [] transportation by rail carriers . . . is exclusive."

This conflict cannot be finessed. If "K" Line is a rail carrier with respect to the inland portions of the through transportation in this case, then the STB, and only the STB, has jurisdiction, which would nullify in every such case the otherwise applicable jurisdiction of the FMC. It is not necessary to nullify the FMC's inland authority in order to give effect to the STB's jurisdictional statute, however. If the Interstate Commerce Act is read as applying only to entities that physically provide rail carriage, and the water transportation jurisdiction of the STB is limited to the plain terms of section 13521, then any conflict is avoided, and no jurisdictional gap is created. "[W]hen two statutes are capable of co-existence . . . it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 533 (1995) (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974)).

2. The Ninth Circuit Misread the Interplay between 49 U.S.C. 10502 and 10709.

The Union Pacific will no doubt address the Ninth Circuit's error in interpreting the relationship between sections 10502 and 10709. Because the point so directly affects the contracting practices of ocean carriers, however, WSC addresses it briefly.

The Ninth Circuit's holding that a rail contract for transportation that has been exempted from regulation under 49 U.S.C. 10502 may not be removed from regulation under Section 10709 violates the plain words of the statutory sections and contradicts the agency's interpretation. The lower court's error appears to flow from the incorrect assumption that

transportation that has been exempted from regulation under authority of section 10502 is thereby placed outside of the STB's jurisdiction. *See* Pet. App. 19a (indicating through emphasis that "rail carriers providing transportation *subject to the jurisdiction of the Board*" under 10709 are by definition providing "nonexempt transportation"). Once it made the erroneous finding that exempt transportation was outside of the jurisdiction of the Board, then the Ninth Circuit was bound by the language of 10709 to find that that section did not apply, because 10709 by its terms is only applicable to contracts for rail transportation that is "subject to the jurisdiction of the Board. . . ."

The problem with the Ninth Circuit's reasoning is that the statute is clear that the Board *does* retain jurisdiction when it issues an exemption, because subsection 10502(c) allows the Board to specify the duration of an exemption, and, more telling, subsection 10502(d) authorizes the Board to revoke an exemption. The Board could not revoke an exemption if it did not retain jurisdiction, and the Board has so held. *See* Expedited Relief for Service Inadequacies, STB Ex Parte No. 628, 63 Fed. Reg. 71396, 71398 (Dec. 28, 1998), in which the Board stated in response to an assertion that it lacked jurisdiction over exempted transportation that: "AAR is clearly wrong with respect to exempt traffic. We retain full jurisdiction to deal with exempted transportation, as we can revoke the exemption at any time, in whole or in part, under section 10502(d)."

Absent the Ninth Circuit's mistaken understanding of the effect of an exemption on the Board's jurisdiction, it would have been compelled by the plain language of section 10709 to hold that the rail trans-

portation here, because it was conducted under a rail contract between "K" Line and the Union Pacific, was not subject to Carmack. That is so because section 10709(c)(1) provides that "[a] contract that is authorized by this section, and transportation under such contract, shall not be subject to this part, and may not be subsequently challenged before the Board or in any court on the grounds that such a contract violates a provision of this part." "This part" includes 49 U.S.C. 10101 through 11908, which encompasses the Carmack Amendment as applicable to rail transportation, codified at 49 U.S.C. 11706.

Because essentially all rail transportation sold to international ocean carriers is provided under contract, this simple statutory basis is sufficient both to decide this case and to provide the guidance and certainty necessary to allow the international transportation system to order its contractual relationships to provide predictable and efficient operations. Because *Kirby* makes clear that the ocean carrier is authorized to negotiate liability limitations with the inland carrier with binding effect on the ocean carrier's shipper customer, the applicability of Carmack is the only remaining potential impediment to the parties' being allowed to give effect to their bargained-for contract. Once the existence of the rail contract removes Carmack from the picture, the operational, insurance, and legal problems that flow from the lower court's decision disappear. That result also gives effect to the clearly expressed Congressional intent that rail transportation contracts be subject to contract law and nothing else.[6]

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[6] The legislative history of the Staggers Act reinforces the conclusion that the section 10502 exemption power was to be

3. The Contracts in This Case Meet the Requirement for Varying Liability Limits Under Carmack.

Although the argument immediately above makes it unnecessary to reach the Ninth Circuit's holding that "the 'combined effect' of 10502 and 11706 is to permit carriers providing exempt transportation to contract for terms that are different from Carmack's defaults so long as they first offer the shipper the option of full Carmack protections, presumably at a higher rate," Pet. App. 28a, we address the point both in the interest of completeness and also because it relates to the broader issue of contract freedom discussed in our statement. The Ninth Circuit cited only to the Second Circuit's decision in *Sompo Japan Ins. Co. v. Union Pacific*, 456 F.3d 54, 60 (2d Cir. 2006), for the proposition quoted immediately above. *Sompo*, in turn, relies on decisions of other circuits, which themselves lack any textual statutory underpinning and which are based on an outdated understanding of how the transportation industry operates and is regulated.

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complementary to, not mutually exclusive of, any broader deregulatory decisions (such as those in section 10709) that Congress made in the statute: "The policy underlying this provision [current 10502] is that while Congress has been able to identify broad areas of Commerce where reduced regulation is clearly warranted, the Commission is more capable through the administrative process of examining specific regulatory provisions and practices not yet addressed by Congress to determine where they can be deregulated consistent with the policies of Congress." H.R. CONF. REPT. NO. 96-1430 (1980), *reprinted in* 1980 U.S.C.C.A.N 4110, 4137. Thus, what is now section 10502 was not designed to limit the deregulatory exemptions granted by Congress; it was designed to add to them.

The Ninth Circuit's opinion, as well as the decision in *Sompo* and those of other federal courts imposing the requirement of an explicit offer of "full Carmack protection," appear to stem from a misapplication of the Court's decision in *New York, N. H. & H. R. Co. v. Nothnagle*, 346 U.S. 128 (1953), a case that was cited as supporting authority in *Kirby*, 543 U.S. at 19. In *Nothnagle*, the carrier argued that it effectively limited its liability for lost baggage through its tariff on file with the Interstate Commerce Commission. The tariff stated that the carrier's liability would be limited to $25 for lost baggage unless the passenger had in writing declared a higher valuation.

The Court noted that the Carmack Amendment, as it existed at the time, allowed carriers to limit their liability for property "concerning which the carrier shall have been or shall hereafter be expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property." *Nothnagle* at 134 (quoting 39 Stat. 442, 49 U.S.C. § (11)). The Court held that the form of the carrier's tariff complied with the requirements of the statute, but that the carrier's liability was not effectively limited under the statute because "[t]here was no 'value declared in writing by the shipper or agreed upon in writing.'" *Nothnagle* at 135. Specifically, the Court noted that "only by granting its customers a fair opportunity to choose between higher or lower liability by paying a correspondingly greater or lesser charge can a carrier lawfully limit recovery to an amount less than the actual loss sustained." *Id.* Because the carrier there did not even issue a receipt for the baggage at issue, the Court held that the plaintiff "had no reasonable

opportunity to discover" the carrier's limitation of liability. *Id.*

Before the passage of the Staggers Act, rail carriers were required to file their rate offerings in tariffs filed with the ICC. Under the so-called "filed rate doctrine," only filed rates could be charged; any other rate was not just unenforceable, it was unlawful. *See generally Louisville & Nashville R. Co. v. Maxwell*, 237 U.S. 94, 97 (1915) ("Under the Interstate Commerce Act, the rate of the carrier duly filed is the only lawful charge."). Thus, before Staggers, a carrier wishing to limit its liability under Carmack had to: (1) obtain authority to publish "released value" rates from the ICC; (2) actually publish those rates in its tariff, associating different liability limits with different freight rates; and (3) provide the shipper with a reasonable opportunity to declare the cargo value.

In the Staggers Act, Congress fundamentally changed the regulation of ground transportation, allowing rail carriers to enter into confidential contracts with shippers instead of setting rates through filed tariffs. In addition to removing the requirement that sliding-scale "released value" rates be published in tariffs, section 211 of the Staggers Act also removed the requirement that rail carriers obtain prior Commission approval of reduced liability limits. Thus, after Staggers, the only remaining requirement for a carrier to limit its liability is that the carrier provide its customer "an opportunity to declare the full value" of the cargo. *See Kirby*, 543 U.S. at 19 (citing *Nothnagle*, 346 U.S. at 135). Under Carmack as it exists today after Staggers, that limitation may be effected "by written declaration of the shipper or by a written agreement between the shipper and the carrier . . . ." 49 U.S.C. 11706(c), Pet. App. 70a.

Shippers today have much greater opportunities to negotiate liability limits than they did before the Staggers Act. Because virtually all of the cargo of the sort at issue here moves under service contracts (between the shipper and the ocean carrier) and rail contracts (between the ocean carrier and the rail carrier), there is much more give-and-take between the carrier and the shipper than in the past. Because shippers today go through a contracting process before handing their cargo over to the carrier for transportation, as opposed to being bound by law to a tariff that they might never have seen under the old system, it would be difficult today to conceive of a situation in which a shipper did not have a full opportunity to declare a value in excess of the carrier's stated limitation.

In *Kirby,* the Court cited *Nothnagle* for the proposition that a carrier has the duty to give a shipper a "fair opportunity to declare value," and that the carrier satisfied that requirement through negotiation of the terms of the bill of lading. *Kirby*, 543 U.S. at 19. Just as in *Kirby*, "K" Line's bills of lading here,[7] through incorporation of COGSA, provided fair notice and constituted a written agreement to value the property at $500 unless the shippers indicated a higher value on the bill of lading. The shippers did not so declare. Thus, even if Carmack applied here, which it does not, the limitations on the rail carrier's liability set forth in "K" Line's bills of lading are enforceable.

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[7] The applicable service contracts signed by the parties here all incorporate the bills of lading and state that the bills control over the service contracts. Joint App. 190.

CONCLUSION

The Ninth Circuit erred in holding that "K" Line became a railroad by subcontracting with a railroad. The lower court also failed to recognize that the rail transportation here is exempt from the Carmack Amendment under the plain terms of 49 U.S.C. 10709. Even if Carmack applied, however, the terms of the through ocean bills of lading and service contracts negotiated between the ocean carrier and the shippers satisfied the "written agreement" requirement for limiting liability under Carmack. The decision below should be reversed and vacated, and the liability of the ocean carrier and the railroad should be limited to the COGSA limits to which the shippers agreed.

Respectfully submitted,

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